Decrees, No. II.

Of

Little to things

Real

by

Devise

In two books.

Book II.

Title by Devise. (Continued.)

How far Parol Evidence may be admitted to control or explain a Devise.

Every instrument consists of matter of fact, & matter of Law. The former may be tried & proved on an issue in fact. Ex. whether the instrument was executed — whether after Ex^d it was altered &c. &c. (Pow 447. 8 Co. 155.

But matter of Law is not the subject of an averment — not triable by a Jury — Ergo not provable, as a fact. (Pow 477. 8 Co. (55) — Ex Devise to "A. & his heirs" — what est^e A. takes, is a Qu. of Law, to be determined = matter of legal construction (Pow 487. 8.) An uncertainty of the former kind is a latent ambiguity — of the latter, patent (1 Stute, 31. — (Evidence, 91-5.

Hence y^e gen^l rule: That testat's declarations cannot be given in Evidence, to control y^e operat^n of the words used in his Dev^e, or to give them an import, which, of & in the face of them they will not bear. This rule has obtained ever since devises were required to be written & before (in &c. &c. of Frauds (Pow 477. 501. 678. Plow 345. Cro. J. 140. 8 Co 88. 2 Rol. Rep 136. 7. 141. 2 Ab. 217. 3. Mod 318. 1 Ch. Ca. 96.) — & indeed, parol evidence is inadmissible, regularly, to give y^e words of a deed or will any other sense than they bear. But some limitations have been allowed to vary their strict & literal meaning. 8. 116

Post 112.

It holds in the case of wills at Com. Law, (see Evidence) 91. 103. Cast. 113. — Ante 37.

Wills

Parol evidence admitted to explain.

(As to Devises.)

Testators declarations may apply to the Devise or to the person of the Devisee - In both cases ~~they are~~ inadmissible, ~~Pow. by S. & Walker Appx. &c.~~ when the object is a matter of Law - i.e. to matter of construction upon the face of the Instrument. Stat. 4° S. 5 c. 2. Ey.

1. As to the import of the Devise itself:-

Ex. Devise to A. & the heirs of his Body; remainder to B. & the heirs male of his body. "on cond. that he or they sh. not alien" &c. - Parol Evidence "not admitted to prove who were meant by "he or they" - Matter of Legal construction, upon the face of the Devise. (Pow 478. & 487 8. 5 Co. 66. 2 Vin 98. Fon 500 2 Ves 216-217.

So, if one devises to his wife for life, parol evidence "not admissible to prove that it was intended to be in lieu of dower. (Pow 480. 4 Co 4. 5. 2 Ray. 438. 1 Ey. Cas Abr. 219. ~~2 Ves. Jun. 1~~ 2 Vil. Jun. 120.

Parol evidence not admissible to explain a Will.

(As to Devise.)

Devise.—

So. where a devise was on cond., even Letters, written by Testator, were not admitted to prove, that the events, which had happened, were intended by him to amount to a breach of the cond. (Pow. 480. 1. 3. Sal. 232. 2 Vern 333.) For the Letters were not communicated w. the negotiation of a devise, as prescribed by the St. of Frauds.

So. where one having cov. to sell his Estate to his Son-in-Law for £1500. less than it was worth, devised £1500 to the Son-in-Law — Parol evidence was not admitted to prove that the Legacy was in satisfaction of the cov. (Pow. 481. 2. Ca Ch. 138. — 1 Vern. 231. —

So. on a devise to his Natural Daughter and her Issue, parol evidence of his intention, that the Land shd. not be subject to her husband's debts, was excluded (Pow 484. 2 P.W. 318. 1 Vern 189. 2 Atk 216. 373.

(As to devisee.)

2. As to the person of the devisee — ~~Testator cannot devise to a fictitious person, or to an alien enemy.~~

Title by

Devise ~~ev.~~ when admissible & ~~ex~~ inadmissible to explain.

(Q. of devises.)

Devise to A. who died testator living. Evidence not admissible to prove testator's declarations, that B. (A's son) should have what A. would have taken, if he had lived. There is no ambiguity patent or latent. ~~Attempt to contradict the Devise~~. (Pow. 485. Plowd. 345. Cro. E. 422.) Tho' words of futurity, would in terms, a devise to A. & his heirs & children living at testator's death, & testator survive it, yet if A. die before testator, such devise will be void. (By parol) ~~Ev.~~ not admissible.

Devise, 54.

+ for whose ben. est. Words, Limitations:

So, Devise to the heirs of the body of A. if he die without issue to B. Testator dies, A. living. His issue cannot thereupon take; + parol ev. of testr's intention to give to A's children, ~~—~~ devising his life, not admissible. (Pow. 486. 2 Leon. 70. Pr. Ch. 84.) For children or issue, ~~—~~ intended to take, he living, is a Rule of construction on the face of the devise. Pow. 487.

So, where testator having mentioned two women, devised to "her". parol evidence not admissible to shew who of the two was meant. (Pow. 500. 2 Ves. 216. 217.) For the ambiguity arose upon the face of the instrument, & was, therefore, matter of mere construction.

Parol ev. when admit. to explain &c.

Latent ambiguities of the deed.

Devise.—

But as to what are called (~~ante, 103~~) matters of fact, (i.e. as to latent ambiguities) the rule is, that parol evidence is admissible to explain them, if the proof ~~calls a word~~ stands with the words of the devise; (Pow 497. 8.495. 2 Roll 65. 2 Ves. 210.); ~~but where the proof contradicts~~ (Pow 495. 8.) but not to alter the words. # (Pow 495. 8 12. 8 25. 2 Ves. 216. ~~Cowp. 714.~~ Talb. 240. Pow 591. — ante, 71.

The rule, as to conveyances, is the same. Pow 487.

Thus if one devises or grant to his Son A. (he having two sons of that name); parol ev. is admissible to shew that the younger Son was intended. — (~~Parol ev. admissible to explain latent ambiguities~~) (Pow 488. 9. 5 Co. 68. 2 P.W. 137. 1 Ves. 231. 8 Co. 155.) ~~Parol admissible to explain latent ambiguities~~ That the testator supposed the elder to be dead & his declarations can be proved. ~~Cook~~ viz. (Pow. 495. 6. 7. 2 Ves 210. 1 P.W. 674. 6 T.R. 671. — ante, 73. 91. — Bac. 12. 8 The word Friends with which a devise is expressed, i.e. is connected with them: (and the ambiguity created by parol (i.e. by proof of extrinsic facts), may be removed by the same kind of ev.

So, if a devise were to J.S. of D. (there being two.) Pow 490. 2 P.W. 137. 1 Ves. 231. Pow 496. 1 P.W. 674. — Note, 73.

Parol Evidence when admissible to explain Doubtful Words.

(Latent ambiguity.)

Title by

So, devise to A. of the Manor of L. (he having two) - parol Evidence is admissible to prove which was meant. (Pow. 488. 492. 8 Co. 155.) ~~Strange case with the words~~ &c. 1 Bro. C.C. 472. - Pratt, 73.

So parol Evidence has been admitted to prove whether an instrument was intended to be a Deed, or a Devise. Pow. 490. 14. 3 Keb. 310. 1 Mod. 117.) & that directions were given to make a will. (page 4 -) - For if one gives to A. 12 Ac. of W. Down, intends i.e. to A. part, whether less or more ~~shall be given~~ A. has nothing, in as much as his will.

So, if a devise is made to A. (there being Father & Son of that name); parol Evidence is admissible to prove, that testator did not know the Father. (Pow 492. Sal. 7. 2 Mod 174. 1. Ath 411. 2 P.W. 136 ~~Cap~~ (Note 3).

"For the uncertainty is created by such evidence of the proof "stands out of will."

Parol evidence admissible to explain latent ambiguity.

Devise.

If a Devisee is wrongly named; still, if sufficiently described, he may be proved by parol, to be the person intended.* (Pow 337. 340. 405. 407. 499. 498. Co L. 5a. 8 Rep. 197. 11 Co. 21a. 1 Jarm. 293. 6 T. R. 671.) ~~(Supra) Ante 91. Pow 488. 490. 160. 155. 1 Jarm. 293. 6 T. R. 671. Pow 337. 340. 405. 407. 499. 498. Co L. 5a. 8 Rep. 197. 11 Co. 21a. 1 Jarm. 293. 6 T. R. 671. Pow 337. 340. 405. 407. 499. 498. Co L. 5a. 8 Rep. 197. 11 Co. 21a. 1 Jarm. 293. 6 T. R. 671. Pow 337. 340. 405. 407. 499. 498. Co L. 5a. 8 Rep. 197. 11 Co. 21a. 1 Jarm. 293. 6 T. R. 671. Pow 337. 340. 405. 407. 499. 498. Co L. 5a. 8 Rep. 197. 11 Co. 21a. 1 Jarm. 293. 6 T. R. 671.~~

~~3 L. Co. L. 3a. — See Doe, 25. ante, 73.~~

— Same reason

* The rule, in case of deeds, is said by Pow. (p. 498) to be different — 2 Rep. 11 Co. 21. a. 4 Leonard 3. 5. Co. L. 3a. — See Doe, 25. ante 73.

So, devise to A's 4 children (the having 6. — 2 by B. & 4 by C.) — parol evidence is good to show, that the 4 by C. were meant. (Pow 494. 5. 521. 2 Ves. 216. (Ante, 91.) — Only even declarations of testator may be proved, (Pow. 495. 7.

Same reason

But a devise to "one of the sons of A." (he having several) is void — parol evidence is not admissible. (For this is a latent ambiguity — Matter of legal construction. (Pow 488. 490. 160. 155. 1 Vel. R. 99. 2 Ves. 624. 5. — (Ante, 91.

Title by

Proof w.ch when admit.d to explain &c.

(Latin & ambiguity.)

If the name, given to devisee, applies exclusively to one person, & the description, exclusively to another; it may be proved by parol, that the ~~testator~~ name was inserted by mistake. Semb. - 1 T. R. 671. Pow. 498. q. 1 Atk. 410 ~~Bacon~~ (Bacon, 73.) Ex. "Mr. S. eldest son of Thos." - there being Jas. S. who is not y.e son of Tho.s - ~~the~~ ~~testator~~ y.e name of Jas. S. & not so being Richard.

~~Poor may other proof be admitted in Book a case?~~

+ & decided this by y.e name,

So, where testator gave a Legacy to wrong drams,+ ~~which the name was born~~, parol evidence was allowed to prove, that testator knew such a person, & used to call her by the wrong name. (Pow. 499. 2 Atk 240.

Here, it might be s.d, y.t she was known by y.e name given in y.e devise

\# By "the poor" are here meant poor, I conclude (since 43 E.)

So, where a devise was to the poor of A. in the County of B, - & A. was not in that County - parol evidence admitted to ascertain the parish. Pow. 499. 2 Eq. Ca. Abr. 416. 14.

Parol evidence admitted to explain a latent ambiguity.

Devise.

+(i.e. not identified by any other designation);

But if the person, wrongly named, is not at all described, no evidence is admitted to shew who was intended. (Semb. ~~Abbington~~ Hume - Jervoise / Cow. 500. 2 Ves. 217, 218.) - The evidence (~~sometimes~~) will not "stand with the words" - i.e. (3 Jur. d. Gartside mac) - proving no such towns, but being the Testr. Qu. if it may be proved, that the disposition was by mistake? (Vide Cow. 523.) - Qu. if parol evidence admissible, to explain intent, where words of devise are void for uncertainty, i.e. where words of devise are void, not from uncertainty of the words, but from the nature of the subject matter?

+ & not may be applied to either of two persons,

If a term, in itself equivocal, is used; parol evidence is admissible to direct the application of the term - This is done not for the purpose of furnishing a construction, (i.e. an explanation) of the object (~~explanation~~ of words understood); but an interpretation - i.e. an explanation of terms, not ordinarily understood. - (Cowen 500, some of the cases go further) - (Post) - This case is like that of a foreign word used in a Devise -

Ex. One devises Seniori puero - Evidence may be admitted to shew, that eldest child was intended; & that a day-pupil might take. (Cow. 340. 496. Dy. 337. Ab. 104. 5. Vin. 32, Bac. Abr. Wills, Y. 4. - "Senior" may signify child. The case is consistent with the books.

Parol evidence admissible to explain ambiguities.

Title by

(Construction of wills.)

Courts favor.

So, where a devise is to "testator's nearest relations" — parol evidence may be admitted, to shew, that he knew certain persons, answering the description; but no further. ~~Evidence not admissible~~, (Doe 4 T. R. 126. 231. Rep. Tenures 84.) — But his declarations, shewing, that he used the words in a particular sense, cannot be proved. — Nor can parol evidence, even of what formerly stood in a will, which was destroyed by fire, or otherwise lost, be admitted. (Ibid.

In these cases, indeed, evidence is never admitted, to give words a sense, which they will not bear, on the face of the instrument. ~~Page~~ (Ante, 133.

Ex. The word "Son" is sometimes construed to mean a grandson, (if there is no son living.) But if it appear from the devise, that the word "son" was intended to apply to a son only, no parol evidence is admitted to shew, that the word, was meant to apply to a grandson. — This would be to contradict the legal construction. (Doe 501. 677, 8. 3 Mod 318. 1 Brownl 360. Ray. 406. 2 Lev. 243. 2 Show 63. 2 Vern 106. 7.) As, if there is a legacy in the same instrument to the "grandson". (Ante. Page. Ante. (Ibid. † Prec. Ch. 8. 9. — (Ante. 79.

Devise.

Parol Evidence not admitted to supply any thing not written. Eg. "£200 to a Charity, according to the will of Mr ——." Evidence not admitted to shew, whose name was intended to fill the blanks. (Pow. 501. 2. 2 Atk 240. Pow 523. 8 Vin. 195. 2 Eq. Ca. abr. 415. 5. (The w.t be to read the will as, it was. — The uncertainty is patent.

So when testator gave directions, to have all his personal Estate given to his Exr, & it was omitted by mistake — Evidence of the mistake may not admitted. (Pow 523. 8 Vin 195. 2 Eq. Ca. abr. 415. 5.) — Where it was dixit does not make a will. — It w.d be making a will or part of one, by proof — instead of explaining it.

Rules of Law & Equity have also permitted proof of extrinsic facts, to explain terms of equivocal import, as to the quantity given, & where the proof stands with the words." (Pow. 502. 521.

Devise to the right heir at law of testator, &c.

Proof of circumstances admitted to ascertain intent.

Title by

1. Proof of testator's circumstances has been admitted, to ascertain the quantity of interest; the import of the terms being Equivocal.

Eg. Devise of testator "whole Estate" to J.S. "he paying testators debts" &c. - Evidence was admitted to prove, that the personal Estate was insufficient to pay them; & that, therefore, a fee must pass, that devisee might sell: (Pow. 502-4. Str. 281. 295. 3 Atk. 49.)

The word "estate" being construed according to the subject-matter, & quantity of interest devised.

Now settled, that "Estate" + carries a fee, * unless restrained, by other words. (1 Atk. 412. 2 Atk. 657. 4 Ves. 93. 5 Ves. 562. 6 Ves. 34. 2 Ves. 50. 8 Ves. 65. 502. 3 Bro. C.C. 55. 7 Ves. 344.

So when the devise was upon equivocal words, whether a Legatee of testator's pass. estate to the "absolutely" or for life only (the being testator's wife); Evidence was admitted, to prove, that it was intended to support her, and not the principal, as stock. (2 Vern. 552. 2 Bro. C.C. 71. 1 P.C.C. 414.

+ The cr. then proving y.t "Estate" was given to such y.t quantity of interest, as testator was entitled to.

+ ex vi termini, (y.t y.e testr. had a fee),

* The word, "hereditaments", does not of itself, carry a fee; but when a testr. devises y.t sub-ject, y.t is, y.t testr. has, & 3 Bro. C.C. 7. 8 P.C.C. 502. testator's int.t in it. (3 P.C. 355. 5 Ves. 558. 6 Ves. 175. 8 T.R. 497. 1 Bro. C.C. 558. Sel. 229. 2 Vern. 229. 1 Ves. sen. 2. 2 Vern. 281. 1 Ves. sen. 82. 3 Atk. 4. 5. (2 Vern. 152.)

115. l. [In devise the following rules, a [illegible] p. 115.]

(But y^e pa. probably belongs to tit. Ests. in Lands &c. p. 11.)

There is an established distinction between y^e ca. like the last (in wh. y^e clause binds y^e person of y^e devisee), & those in wh. it attaches only upon y^e land, as subject to devise. In y^e latter ca. y^e devisee takes only a life-estate; because he cannot be a loser. 8 T.R. 1. 2 Bos. & P. 257. 4 East 500. 5 [illegible] 92, 95, 98.

Thus, under a devise "to A. he paying £100, or debts &c. out of y^e profits" he takes but a life-estate. For y^e charge attaches upon y^e land only, & devisee is not bound to pay, unless y^e profits are suff.^t so y^t he cannot be a loser. Co. 16. 3 Burr. 1541-2. 1523. Cowp. 236. 2 Bos. 250-2. 2 [illegible] R. 348. 3[illegible] 8. 349. 350.

Under a dev. of land, my debts & legacies being first thereout paid [illegible] holden to take a fee. 3 [illegible] R. 350. — Is y^e inconsistent w^t y^e last case? 2 Bos. & P. 252. 2 [illegible] R. 349. 5 East 93. 3 Burr. 1541.)

~~[illegible]~~ "thereout," "out of its profits" may perhaps [illegible] substantially the same. (vid. 10 Johns.) {"Thereout" seems to mean out of y^e land — not of y^e profits. ≠

In a late case the (y^e devisee) having "thereout" was holden to take a fee. 5 East 87, 95. — Cont. 2 [illegible] R. 349 [illegible] 350. ~~[illegible]~~ Qu. Is not y^e former (5 East) y^e better opinion?

But [illegible] y^e rents of my lands, thereout * a life [illegible] payment of debts &c. carries only a life-estate. 5 T.R. 564. 558. Salk. 175. 5 East 87. 2 [illegible] 341. Co. E. 330. 4 East 499. [illegible] 240. 2 [illegible] 247. — Cont. 1 Bos. & P. 558.

For this [illegible] a residuary [illegible] i.e. a limitation of what [illegible] is after y^e debts &c. are paid — not an [illegible] of a charge [illegible] devisee &c. (5 East 93. 95.): so y^e devisee w^d not be bound to pay any thing.

* Qu. doubtful, if y^e reason [illegible] "[illegible]" [illegible] lands [illegible] { ≠ [illegible] distinction, y^t not y^e form [illegible] y^e [illegible] of a [illegible] of y^e land [illegible] of y^e sale [illegible] debts &c. [illegible] having nothing to pay out of y^e land, & [illegible]

Devise.

Charge of £100. when Acm. d. to & valu it.

2. Proof has formerly been admitted (for same purpose), as to the value of the property devised. (Pow. 518. 506. 7. 513.

(Stat. in Mortm. c. 11.)

Ex. Devise of all the testators "Land" to A. (without words of limitation) paying to B. &c. £100. in a year (out of the Land). Proof admits, that this sum exceeded the annual profits of the land - to shew, that a fee was intended. (Pow. 506. 7. 513. Freem. 479. 2 Eq. Ca. abr. 198. Bar. 1898. Pur. Ch. 71.

Act. 2 & 3. 3 & 4 Will. 4. c. 74. - Act 2. & 3. 2. 13.

(3 & 4 Will. 4. c. 74.)

Devise of "Land" charged with the payment of a "gross sum," carries a fee, of course. (7 T. R. 356. 5 Ves. 292. 13. 8 Ves. 1. 503. 3 Ath. 341. 2 Ca. Ab. 202. 2 Atk. 343. 7 Brown. P. C. 2. 91. 503. Sec. Eq. Ca. 4 East. 496. 2 Ves. 341. 1 Bro. C. C. 53. 2 Bro. C. C. 251. Ex. would be paying £100. "charged upon the land" - "payable out of the land" - "payable out of the rents" &c. - "charged upon" &c. - "out of" &c. - "issuing out of" &c. - seems to be considered as words of direction only. See Wright v. Pierce. 2 East. 313. Ann. Rev. 2. Cowp. 2. 3.

+ And yet by such clauses, he is reasonably bound to pay the charge out of the annual profits of the estate. (Co. Ch. 2 Atk. 349. 2 Bro. C. C. 250.

Ex. Devise to one for life, &c. 5. 1.

3. Proof admits as to the condition of (testator's) family, to ascertain the application of a term which may be a word either of purchase or limitation. Pow. 518. 004.

+ 88.

Evid. inadm. when & wn. to explain &c.

Title (y)

E. Devise "Land" to A. & "his children" or "his issue" - Proof admitted, as to the fact of his having children, & not, at the time of the devise. If not, an Estate tail is created - Pow. 505. 660 17. Dany 309. 310 Hunl 227. 231. 1 Bulstr. 219. 176. 181. 486. 460. 4 T.R. 294. ~~Supra~~ Ante, 75. Vid. Eff. in Lands &c. 3.

+ As the children at the time, & then take as tenants in common, or joint-tenants.

4. Evidence may be admitted, as to the State of testa's property, (i.e. to ascertain the meaning of words, not in themselves equivocal, but which, when considered with reference to the Estate of his property, will bear, & require, a construction, diff.t from that, which they primâ facie import).

+ for a similar purpose:

E. 91. Devise of a house, called "Bell Tavern" to A. - Proof admitted that A. himself was Ten.t in tail of the house, & that devisor had only the reversion; in order to shew, that an Estate in fee was intended. Pow. 508. 509. Sai. 234. Ray. 831. Hill. 744. 1 Bro. P. C. 108 - 2 ~~Vern.~~ Eq. Ca. Abr. 757 - Neither testimony was admitted, I believe, as to any other extrinsic fact.

+ The Ct. in wh. an Act. will be furnished, by Title-deeds.

Proof not admissible to explain.

Devise.

So, in Fonnereau v. Poyntz, (1 Bro. Ch. 472. but admits to explain ambiguity, but there was none in the face of the instrument.

Parol evidence admissible to explain latent ambiguity, but not to explain patent ambiguity.

Or, Fesca.

the proof "stands with the words", tho' not with the meaning, which they prima facie, convey.

(Recapitulate y^e distinctions, from p. 107, top — to y^e reads 1, 2, 3, 4 (p. 114, 115, 116. These constitute all y^e exceptions to y^e gen^l rule, excluding parol evidence — save — for y^e purpose of rebutting equity)

But no averment, that does not "stand" with the words, can be admitted. Thus where one devised to "the children of A" (he having six) & averred, not admitted to shew, that 4 only were intended. (Pon. 522. 494. 5. 512. 2 Ves. 216.) For y^t w^d contradict y^e words.

So, where testator devised the residue of his Estate to his 6 children — one of them being indebted to him £3000 — w^ch not admitted to shew, that his intention was, to forgive the debt: For the residuary clause included it. (Pon. 522. 3. Talb. 240. Sha. 1 Ves. 2 Fonn. 52.) For w^t was the w^d intended? It will — i.e. y^t will w^d have

N.B.
Ewer v. Corbett
cited & explained
infra.

So, where the residuum of testa's property was not disposed of - Evidence not admitted to shew that testa's intention was that his Exrs shd not have it. (Pow. 524. 2 Bac 426. Exrs of H.H.) For it wd have contradicted ye construction & legal effect of ye terms of ye will.

Ewer v. Corbett
B.- Evidence, 52.

But, parol evd in Eqty, in ct of Equity, of testa's declarations is admitted to "rebut an Equity, & raise an implied" + - not to establish it. "An Equity" means in general any Equitable claim - But the meaning of ye rule, as now applied to the case of a devise, is [illegible]

+(i.e. an equitable implication, or inference)

That where, from the face of the devise, Equity raises an inference, which is contrary to the legal conclusion, arising from it, parol evidence is admissible to rebut or control the former + - which is, in effect, to establish the latter - i.e. ye legal conclusion. (Pow. 524 (See Beaumont v. Fell 1 P. Wms 142 - 2 Ves. 92.)

+(ye equitable inference) -

The wt is admd, in ye case, not to control ye legal construction of ye instrument, but to repel an inference of Eqty, opposed to that construction; & thus, to give effect to ye latter

Devise.

Devise of the residue not to exhaust the fund.

4. If land is devised to an Ex^r for payment of debts, the surplus belongs, at Law, to the Ex^r & Eq^y there is a resulting trust, (~~as to the surplus~~) as to the surplus, to the heir - i.e. Ex^r is trustee of it to the heir. (Pow. 326. 528.) - In this case, Ex^r is admitted, (on a bill by the heir), upon oath of test^r declarations, to shew that the Ex^r was intended to have the surplus; (Pow 525. 6. 1 Ch. Ca 196. 2 Vern. 252. 677 Talb. 79. 2 Ves. Sen. 1824. Vern. 328. ~~2 Eq. Ca. Ab 506.~~ 2 Eq. Ca. Ab 506. 1.

+ The rule not to admit parol evidence to vary the Will.

Principle of the distinction: Equitable interposition being discretionary; Ch^y will admit test^x declarations - when inferior to Ex^r - to direct the Ex^r's conscience, whether he ought to interfere - & leave the Common law to take its course.

+ in decreeing relief,

So, where test^r bequeaths £200. a piece to 4 or 5. and afterwards, by a codicil, directs Ex^r to pay them £250, cash - evidence was admitted to shew that both sums were intended to be given. (Pow 525. 2 Ves. Sen. 1824.) For the rule is stated in the Letter of the Instrument, the Ex^r, the Eq^y interfere, where contrary to it - in Equity.

+ The rule is adhered to, not to vary the Will, by parol evidence, of Legal effect; but to ascertain whether Ex^r shall take beneficially, or not, & enable, & induce him to interfere; but to prevent him from interfering at all, by shewing it right to be inequitable to do so, in pursuance of the prayer of the Bill, Eq^y of retainer, by test^r.

Suppose a sum bequeathed to Ex^r by test^r, gave considerable Legacies to his Ex^r - from which the inference in Eq^y was that he was not to have the residue. Evidence admitted - (of test^r's declarations) that Ex^r shd have the residue. Pow 527. 8. 2 Vern 677 Talb. 79.

Sill v.

Prod. ev. when com.d to ex-amine &c.

And upon the grounds, that the w.d offered does not contradict the will, parol proof has been admitted to shew, that a devise was intended as a performance of a pre-vious agreement - Ex. Agreed by mar.t articles to settle £ 80 per ann. on y.e wife-H.s (foundation) to her £ 100 per ann. - ^ admitted to prove that the bequest was meant as a performance of y.e agreem.t Pos. 52 q.d Ves. 323. - (See) Ves. sent. 164-5. - Hill, y.e Ct is not at lib.y, not to ob-lige y.e will; but to prevent a double, & vicious rec.t - & thus to rebut y.e agt, claim-ing under y.e agr.t - All ^ is, if y.e settlem.t had been executed, by a conveyance of y.e legal title.

+ On a bill by y.e widow to have y.e agr.t enforced,

+ Qu.a whether this inquiry in this ca. could be. 164-5. and if the Ct. thinks that in this, y.e devise for y.e wife, is in both instances to be taken for y.e same purpose & made for y.e same purpose only - viz. a re-ceipt in bar, for her maintenance? - But is it not with-in y.e prin. of a Ct. letting in ca.s as in y.e ca. y.e agr.t was ex-- not so, in y.e ca. p. 164.

Prod. w.s Qud. as to all cases to counteract y.e int.t - Ex. One devised his real estate to his ex.rs, & omitted to charge the Estate with an annuity, devised to A. because the ex.rs promised to pay it. ~~and admitted. Pos. 52 q.d 2 Vern. 508.~~ Ex.t of y.e ex.rs executor, & m.r & h.r adm.r (Pos. 52. 2 Vern. 505.) to prevent a fraud on y.e test.r & legatee.

Devise

Of Revocations.

Wills & Devises are "ambulatory" till the Testa^rs death - i.e., not consummated - & are revocable by Testa^r. Pow 550. 4 Bac. 2512.

Revocations may be considered under two general views:- I^st. As they stood at Com. Law i.e. before the 29th Stat. of Frauds.- II^dly. as they stand under that Stat.- Pow. 532. 529. Page [illegible] Post. 5^th.

II^dly Of Revoc^ns at Com. Law.

Revocations at Com. Law are of two kinds:
1. Express - 2. Implied. Pow 532.-
1^st Express Revoc^ns at Com. Law might be by writing or by Parol - (Pg 4 5^th)

First by writing - as by a Codicil, or subsequent will, expressly revoking a former. Pow 532.

Title Key

Revocation of Will (Express)

Secondly - By Parol - Where one having made a Devise, expressly declares, "I revoke my Will," or, uses words of similar import. (Powell 533. 632. Dy 310. Noy 65. Bro J. 115. 497.

But in this case it must be clear, that the words were spoken animo revocandi. - (Therefore, where testator said, that, because the Devisee did not visit him, he would not have his Land (making no express reference to his Will) - yet this, not revoked. (Powell 533. Bro J. 115. Bro C. 51.

So words, importing an intention to revoke in future, do not work a revocation at Com. Law. By "My Will shall not stand" or "I will alter it" (Powell 533. 4. Bro J. 497. Mo. 487. Bro C. 308.) - (Same rule holds since the Stat. of Frauds) - Similar expression in writing. = Powell 6. 2 Eccl. 488. 495.

Revocat. at Com. Law (implied.)

Devise.

2. Revocations at Com. Law may be implied.— An implied revocn is by some declaration (not expressly revoking) or some act, which furnishing ground to presume, that testr has intent to devise, hath changed.— Here, the revocn is implied, or a revocn in Law.— (Swin 537. 534.5.

1. First, by some declarn of the testator.— Ex. If one, having devised to A "Blackacre to B and his heirs," shall say "you shall be my heir." (Swin 535. 1 Salk 73. 1 Roll. 253.) Called implied, because y. words do not expressly relate to y. will

2. by acts of Devisor, amounting, to an implied revocn in Law, may be by a Writing,+ or, in fact, i.e. by acts, contradicting and inferred from written instrumt.* (Swin. 535. 536.

+ (implied by Magistrates in order to Records

* By marriage in this & some other States, any Conveyance not of record 2 Bla. 294.

Revoc.n of Devise (in Will) subsq.t Dev.s

Title by

First - By writing;- Ds of one having made a devise, afterwards makes another, inconsistent with, but not expressly revoking it.- Revoc.n is law. Ex. One devises his land to A. & by a subseq.t will, to B. - & the first devises all his Estate to two, & afterwards to one of them. (Doe d. Shiels v. Hicks 5 M. & W. 475 12. Mod. 206.

Said however that if one devise land to A. & in a subseq.t part of the same Instrument, devises the same land to B. Cro. E. 9. 3 Rep. 42. 105 And B. take jointly.- 1 Fonbl. 444. 2 Roll. Abr. 3 Leon. 11. Yelverton 210 & 2 Vern. 35 374. S. C.) - ~~But so also a specific Legacy, & a Lease for Life - Patton - Stoke v. Stoke~~ Co. d. 112. S. C. 3. Rep. 42. Salk. 463.

But if the devise to B. is void, the devise to A. remains. 2 Roll. Abr. 374. - The same rule obtains where the devise to B. is void, however expressed. It is in favor of the heir.

Still, in the case of a specific Legacy, & of a lease for Life, the same rule obtains, however expressed. 2 Roll. Abr. 375. - Wms. Sh.e Legacy. Ex. Co. from the former? *

* Is not there a difference between a devise & a bequest?

Revocᵍ. in
Spir. Cases
(in Civil C.)
(in Eccl. Cts.)

Devise.

But a subsequent devise, (not containing express words of revocᵒⁿ), does not revoke a former one, unless inconsistent with it. Ergo. the mere fact, that a Later devisee recᵈˢ, (tho' found by a Jury) will not warrant ye Ct. in deeding, that a former one is revokᵈ by it. For the second may relate to a distinct subjectᵗ matter or, it may confirm the former. (Pow. 538. 541. Hardr. 374. Show. Pc. 140. 3 Mod 203. Comb. 90. Sal. 592. (Skin. 647). 2 Vern. 737. 1 Bro. P. C. 344. Comyns 87.)

And, tho it is expressly found that the second is differt from the first, yet if it is not ascertained, in what ye differs consists, the first is not revokᵈ (Pow. 538. 541. 3 Wils. 497. 2 Vern. 737. Comyns 87. 1 Bro. P. C. 344. Causa quâ supra. (2 East 488.

Hil. 1 Geo. 2. Rot. 2 Standing Cur. in Scacc.);

Revocation of a former will by subsequent devise.

Title by

But if it were found, that the second devise was inconsistent with the disposition made in the first; the second will be a revocation. Semble. (Pow 540. 4) - But whether the first will be revoked, is found by the jury, or by the Court on the generic issue, viz. "how the T. died as to the property in question" - And also, is such a particular conclusion, found by a jury, or by any other? ≠

+ (as the case may be)

≠ If it be merely a matter of Law, it must, almost necessarily, involve some matter of legal construction - Which Court knows the grounds of the conclusion.

So, a codicil; inconsistent with the preceding devise, to which it is annexed; works a revocation. - By Devise of Black-acre to A. & by a subsequent codicil, giving White acre to A. & Black acre is given to B. (Pow 541. 2. Swith 532. Wms. 32.

But a distinction is taken, between the revoking effect of a codicil, & that of a subsequent devise, in this: That a codicil, being part of the will, (not in its own nature), intended as an instrument of revocation - does not revoke, except precisely in the degree expressed. (Pow 543. 4. Swinb. 15)

E.g. Devise of Land to B. in trust, to

Revocat of codicil (implied) (includg. wast)

Devise.

a charitable use. By a codicil, it is devised, in the same terms, to C. — i.e. to the same B, and 2 others. — The trust not revoked. (Pow. 544. 5. Vin. 176. 186. 17 Jac. I. 449) — It is to that ye. new effect of the codicil, it was to modify ye. original gift given to trus. by vesting it in fee. — 2 Vern. 145.

(Obsd, (it is said by Pow.) a subsequt. instrument will, or devise, varying a disposition made in a former one, is a total revocation. (Pow. 543 Vin. 187.) — Quaere?

Note. If one who has devised land in fee to his son by a settled use, have the same lands to his wife for life. (Pow. 16. 17. 537. 540. 624. 627. 8. 630. 721. Vin. 187 (Ca. Ey. 5.) — 3 Ch. R. 345. n. Comp. 5.

The distinction however, and only one, is this: That ye. subsequt. devise revokes ye. prior one, for such differing or inconsistency in ye. former one; whereas ye. codicil, explaining and qualifying ye. devise, one. — The practical diffce. then, it seems, consists chiefly, in ye. mode of pleading ye. deed.

If one makes a second devise inconsistent with a former one, under a false impression, as to a matter of fact, which furnished the motive to make ye. devise, the supposed fact is, after his death, found not to exist. The first is not revoked.

+ Thus, in ye. last cr. ye. provision in ye. codicil, that land in a devise will, the power ... land been revoked, if ye. person thereby ... had departed this life in the testr's life.

++ i.e. testr ... as to ye. subject or rather ye. interest ... ye. latter exhausts not necessarily so to ye. whole testrs estate. ... ye. cr. where one devised land to, for, or to the use of, A. for life, ... A. for life. 2 Vern. 8. 19. 37. 540. 624. 627-8. — 6

+ If ye. motive appears, in ye. codicil

Recac. Pa. Com. Law (Interlock) Subseq. Decr.

Title by

Ex. One devises Lands to A. & afterwards, by another instrument, recites, that A. is dead, devises the Lands to B. - If A. is alive; he will take. (Pow 545. - Ante, 107. - So, if the second dev.e is, to be called in question, & it appears by evidence, that the Test.r had a former devisee living, (y.t was the reason of y.r placing y.r, y.t his devise not be revoked. (K.

(But according to Pow) a false impression will not avoid the second devise, unless it is the consequence of deceit, practised upon the Test.r. (Pow 540.-)

Ex. The actual deceit - i.e. no wilful misrepresent.n is supposed in her own first Example - She seems from her reasoning, to mean, by deceit, nothing more than misinformation & consequent misapprehension, as to a matter of fact. *

* It seems to be a real deceit, for deception - which latter may exist without fraud. -

And the case, which he distinguishes from the case of deceit, is one, where the mis-apprehension is as to matter of law only - viz - "it being doubtful whether according to the rules of Law or Eqy. I may devise my Estate to the separate use," &c therefore &c. (Pow 547.) And in this case, Pow. supposes the second devise good. *

* Does he mean a false impression, not resulting, or not to answer expectation on y.r part of y.t will?

Revocn at Comn. Law. (Mr Sugd. Powell.) (Mr Jarman.)

Devise.

If a former devise is revoked by a subsequent one, on the principle, that the latter is inconsistent with the former, the revocn operates as well as the instrument itself, i.e. by working effect, as it is declaratory till testr's death. — Ergo the latter being revoked, the former stands. (Pow 549. 4 Bur 2512. Burtt 479 — 1 Bott 174.

+ of y^t latter instrument.

But (semble) if the second dev^e expressly revokes y^e first, a revocn of the second dev^e though it does not re-establish the first, remains in existence (Pow 551.4. Comyns 5 B. Doug 40.) Because the revocn, though expressly, is independent, substantive act, by which the former becomes immediately void. — (My opn it seems accords to y^e principle of a devise by dr. that, in terms revoking a devise.) — Sed. vid. 4 Bur 2512. Comyns 52. 1 Powell.

3 Conn R 576
2 Dall. 266.

+ not depending, for its effect, upon y^e instrument or act of revocation

Revoc.ⁿ & alt.ⁿ Gen. Law. (in Will) (Codicil &c)

Title 69

Secondly – Acts amounting to an implᵗ revocᵒ may be by matter in pais. Pow. 554. 532. 535 + Finch 123

As 1. By a subsequᵗ total alterᵒ of ye relative domestic circumstances of devisor

2. By a subsequent actual, or intended calling in ye testᵗˢ deed. Pow. 554. 565 + Bac. 137. 149.

1st No alterᵒ in the devisors circumstances, except that of marrᵍᵉ & the birth of a child, has as yet been held to be a revocᵒ of a devise previously made. (the devisee being a man) – But qu. an alterᵒ of circumstances prima facie a revocᵒ Pow. 554. 4 Bac 171. 2. 182. 16 Ves. 394. 1 Eq. Ca. abr. 413. Doug. 30. Bul 592. 2 P.W. 441. 2 BC. 376. 12 Vin. 243. 1 Ves 191. Qu. under special circumstances 5. Ves. Jr. 663. For be it pronounced to have changed his intention, as expressed in ye will. For ye reason, see next p. but

(For ye reason, see next p. but)

Devise.

Revoc. by Ct. Law. (Limitation, Marriage &c.)

So, tho the child born is posthumous. (5 T. R. 49.

+ to make a mans devise.

A subsq.t, marr.e only, of the subsq.t birth of a child, only, is not saff.t +, (Sm. L.C. (Ca.s sup.a) ~~to make devise~~ ~~void Regn~~ (Co. Lit.

But in Cur. by a Cab.t Lr. the subsq.t birth of a child, ~~&~~ alone, is a revoc.n of no prov.n is made in ye devise, for such a contingency. 1 Ld. C. ~~Ca~~ 272.

The reason of the rule is gen.lly ye Test.r to be that, from such a change of circumstances, the Test.r is presumed to have changed his intention, as to the disposition of his prop.y (Cox 555. 557. 556. Doug 31.

Recov.ᵗˢ of Cop. Land (in Ejectt. Surrey c. 4.)

Title 69

Never any Cov.ᵗ written or parol, is admissible to prove, that his intention was not altered, &c. to admit the presumption. — Vide Hob. 334. Doug. 31. 35. 1 Bl. R. 441. vid. 2 Ves. jun. 522. 2 East 530 543. 4. Ru. 5 Geo. 3. 448. 684. 1 Ves. 55 Abney, 55. (Mount the Jurisdiction at 55.) 3. 134.

Where a Testr. has given his real estᵗ. in fee to A. & his heirs, whom he afterwards married, & also given a legacy to his brother, and charged the land with the payment of the legacy, this is a revocation of the devise. (Per 556. 7. 1 Eq. Ca. abr. 413.)

† Vide Hawkins's Reports, title Devise.

Any Cov.ᵗ, and w.ᶜʰ is a Decl.ⁿ not to control or qualify, w.ᵗ terms, or by other legal Cov.ᵗˢ, but to explain or ascertain, arising from extrinsic facts, such Cov.ᵗˢ, must be manifestly true Cov.ᵗˢ, and y.ᵉ effect of y.ᵉ w.ᶜʰ is, not to destroy y.ᵉ will; but to maintain it.

But Quere whether the above reason (3. 131), is the true one. — Per cur in the case of a Bail. Sept. 1772 held that a posthumous child revokes the devise (Bamb.) tho' the conception was unknown

Revocation by Codicil, including Marriage &c.

Devise

to the testa^r. - And, & consider, if the time of the conception at his death, & revocation &c. after wd happened, there would be no revocn. - (yet his intention wd not be influenced by the fact in the former case, but in the latter it might be. / 5 T.R. 58. 63.) - And, what legal effect can a mere intention to revoke have if there is no actual revocn? (2 East 541. 2.) - Which, see how decisive, neither makes, nor controls a devise.

What then, is the principle? Accdg to Sr. Horner, there is a tacit condn annexed to every devise at the time of making it, that the testr does not then intend, that it shall take effect, if such a total change of Domestic Circumstances in his case (5 T.R. 58. 63.) - This principle is adopted in Sr. Alexander's 2 East 541. 2. -

This idea, at any rate seems to me rather strong. -

Title by

Revoc. of 1st Test. (unrevoked) (Marriage, &c.)

But there has been no case yet decided, in which marr. &c. have been holden to be a revoc. unless where disposition has been of testa's whole estate. — Roe 550. 556. 7. 2 East 54. 2. Eq. Ca. Ab. 413.

58 (see next rule p. section 58.) p. 192.)

agreed it seems that if testa's subseq. wife & issue are duly provided for, either by p. devise &c. of, or by his dying intestate in part as to her share of a change of interest does not arise; or the tacit cond. does not exist. (2 Roe 554 p. 550. Eq. Ca. Ab. 413. Doug 58 n. (c).

+ y. will is not revoked.

and marr. &c will not revoke a revoc. made in contemplation of such marr. providing for the future wife and issue. 2 East 530. Doug 30. (or if not so manifestly altered, to take, that a will shall be revoked by a new one, or by it was signed with intention to take effect

Revocation at Com. Law. Undecided. (Marriage &c.)

Devise.

By Statute.

But if a feme sole, having made a devise marries, it is (for at least) clearly suspended during cov. So that if she dies before the husb. it is revoked. For it is of the essence of a will or devise, that it be, in testator's power to revoke, or confirm, it. But (by Com. Law strictness) a woman having cov., can do neither. (Fonb. 543. 4 Co. 61. 1 Ld Raym. 181. 1 Bac. 291. 4 Ves. jr. 143.

But if the wife survives the husb. & thus becomes again sui juris, will it revive of course? Secondly, to Com. Law it will. (Fonb. 564. 2 Coro. 343. 2 Salk. 592. 2 Ves. jr. 443. 4 Bac. Abr. 173. 1 Ves. jr. 7. 3 Bac. Abr. 4 Burr. 2512. 1 Ves. jr. 7. 1 Ves. jr. Cont. 2 Bl. 499. 2 Ves. jr.

+ Dec. 1808. Ph. 20.

Title Eq

Coverture & Joint Law (Husband & Wife)

On 6. it is clear, that the Covt is not effected in these two cases any more than that of a man wd be: For by our law, a woman may now make a Covt during Covt (Ante, 38.) - ~~The Rs. now 1805 after it had been decided that pure equity cannot decide~~ (Fitch vs. Beaumont, 6th of 2, 1805.

Becoming non-comp.

2nd pt.

But an alteration in the natural capacity of testator (tho' such as rendered him incapable of making or revoking a Covt) does not, it is said, work a revocation. For when this change is effected, the natural power of revoking (2 W. 564 565, 723. 4 Co 61. a. b. 1 Salk. 184. 2 Vern 105. Eq. Ca. Ab. 234.) there is no pursuance of change of intent, [illegible] to the contrary? (Page) [illegible]

+ It is to be observed in this relative circumstance, that the case of a Covt in a time of peace, and the return of peace.

++ It however will be seen, the case of the Covt of a feme sole married in many respects like the present, [illegible] by the change in her relative circumstances, on the equal [illegible] in favour of the Covt.

Revocn. of Devise by Conv. Law (implied) (Alterⁿ of Circs.)

Devise.

2. An act in fact, amounting to an implied revocn. may consist in an actual, + (attempted) ~~alteration~~ extrinsic alterⁿ in the Estate devised. Pow. 555. 554. 582. — (~~Supra~~ Jurk. 132 (Post 146.

First (of actual alterⁿ) —

In this case the revocn. is the consequence of a ~~positive~~ rule of law, the positive intention of testr. is not regarded - not founded on any presumed change of intention (*) P.C. Pow. 555. 607 582. 2 Atk 57, 1 Bos. & P. 594.) — (Cases in the case of revocn. effected by an extrinsic alterⁿ - Pow 555. 607. 582. 1 Bos. 594. 1 Rol. 615 (~~Supra~~ Post 150.

+ or of any fact condition.

Rule as to Conv. law (in Scotland) (Rule as to Eq.)

Title Deeds

The positive rule or principle in force to, is this; That as the Disposition of a purchase must be dated (at the inception of the deed) if the Estate described, so, the title must remain in the same plight title as it was at the conveyance. (Bell 184. 6. 506. 611. (Erskine) - i.e. it must, in contemplation of law, have been in his person at the time of the execution of the deed, so, till his deed. 1 Bells C. 570. 1 Brown C. 401. + Mack. 45-6. 275. 5).

Hence any alter. in the Est. between the inception, & consummation of the deed, which puts it in a diff. plight, works an implied revoc. (Bell 506. 1 Bells C. 570. 7 H. C. 399. 2 Ves. 516.

Such alter. in the Est. may be by act of the devisor - by act of a Stranger (Post. 151) - or by act of Law. (Bell 506. - (Post. 152.

(Power: Tak-
ing land
(in relief)
(Alter: of est:)

DEVISE.

First: By act of the Devisor. — Ex. Sale of the land devised, to a third person will pass the devise. (Fon. 567.

So, if testr. having an absolute estate in fee in lands devised, makes an alter: in the legal estate only — retaining the beneficial int. (a suitable estate); that revokes a prior devise of the land. Ex. one having devised land, makes a settlement of it to a Stranger, to the use of himself in fee. The devise is revoked: for he now holds the estate by the new limitation as a new purchase. (Pow. 567. S. 1 Rol. 615. — (2 Rol. Ab. 143. l. 4. 1 Bac. Ab. 592. 1 Sharn. 92. 3 Rolle 153.) — Did wd. Curtis 311. Pow. 567. 760. 1 Bac. 570. 7 Ves. 399. 2 Ves. Jr. 417. 4 Burr. 1960.

140.

Rules of Cons. Law (in brief) (Chart of use)

Title by

So, if one, having devised land, conveys it in fee, & then takes a reconveyance of the same land. (Pow 567. Rac. 616. Dy 143. & Co 95. 1 Bos & P. 576. 5 T. R. 1 Saund. 1 Lev. 1 Com.

The rule is the same, tho the conveyance is by Lease & release, in which case, the actual poss., or seisin, is not changed. (Pow 568. 1 Atk 570. 1 Bos 574. Tyre (L. cont.) — Etc. if estate is holden in the exercise of a power, &c.

So, where one, having devised, made a marr. settlement, limiting it to himself, & his children, in strict settlement, rem. to his own right heirs, (Pow 569. 1 Ves 440. 7 T. R. 399.) — Cannot quod supra.

So a recovery suffered of land by use of limitation, will revoke a prior use of the same land. (Pow 570 & 2 Atk 325. 3 Wils 6. 7 Bro P. C. 177. 2 Mass R. 401.

Recov. by Ten^t in Tail in Relⁿ of Est^e

Devise

The preceding rule (p. 138) applies as well to equitable, as to legal, estates. — As if mortgagor, having devised his equity of redemption, conveys it, in trust for himself; the devise is revoked. (Pow. 572. 3. 2 Atk. 741. 579. 803. Show. P.C. 154. 1 Eq. Ca. ab. 411. 2 Freem. 202. 4 Burn. 1961. — Doug. 722. cont.) For if a mortgagee holds it under the heir — Sir. Ja.

And a subsequent alienation in the estate devised will operate as a revocation even tho' the alienee made, is merely to [redacted] Ex. Ten^t in Tail, having devised, conveys to J. S. for the purpose of having a recovery suffered, to the use of himself in fee; the recovery is suffered, the devise is revoked (Pow. 583. 3 Lev. 184. 3 P.W. 163. 2 Bl. R. 823. 7 D.R. 406. 2 Saund. R. 401.) The reason is the same as the last case. — The intention, however manifested, being contrary to the devise, it is revoked — Post, 149

* [illegible]
+ under her estate devisable

Revoc. as to Com. Law inabled; & Pow. of Revoc.

Title by

So, if a man covenants to levy a fine, to the use of such persons as he shall name in his will, & makes his will, & then levies a fine, in performance of his Covt; the will is revoked. * 1 Roll 614. 3 Lev. 170 Sal 341. (Post, 147.) —

* For in y^e ca. y^e fine does not relate to y^e Covt. The latter being no part of the conveyance, but a mere contract to convey in future; & y^e deed is made, not by any person claiming y^e equitable interest under y^e Covt. but by y^e Covenantor himself. — Consult y^e diversity between y^e ca. & y^e of a Convey^e to support a recov^y & v. post, 147.

And the rule is the same, tho' the will is made, & expressly declared to be for the purpose of giving effect to the deed — provided y^e deed " is entitled, as of a new purchase." (Thus, where one made his will of a manor, & then made a settlement to the use of "such persons as he had declared by his will, bearing date" &c. the proffer was adjudged a revoc^n. * (Pow. 582. 2 Salk 579. Mo. 789. 1 Rol. 614. 2 T. R. 387. 7 Ves. 399.) — Pow. 686. that the reference of the proffer wd. give effect; that speaking as a public act. 2 Ld. Ray. 74.

Curtesy of Eng. Law. Publick. (Hutt. a. of 45th)

Devise.

Still further :- If a man, seised in fee, but supposing that he has only an Estate tail, suffers a recovery to confirm his prior title; it is revoked. (Pow. 582. 3 Atk 603-4. 2 H. H 523.) For he holds for the new Estate under y^e recov^y

#"Tis y^e point of view, wherein they differ between a Specific & general devise. a gen^l devise of y^e int^e is a revocation. Cante 45.

And a #"Specific" devise of a lease for lives, is revoked by a subsequent surrender & renewal of it. (Pow. 583-4. 10 W 575. 2 Vern. 168. 2 Vern. 209. 3 P.W. 133.) For y^e surrender determines y^e orig^l Estate & y^e devisee takes nothing under y^e renewal, in a new purchase.

Title by

Renewal at Comn. Law. (Unblick.) (Act a. of 1st.)

in ye ca. of specific devises of

And the rule is the same, as leases for years which are renewable.

2. One devises a lease, holden of A, & afterwards surrenders, & takes a new lease of the same lands. Pow 586. 2 atk 593. Pre Ch. 319. 2 Vern 418) The devisee is worked: For ye intent of ye testator is sufficiently answered by ye surrender, upon ye terms of a specific devise: & does not include ye renewal. This ca. however, does not depend upon ye same principle with ye preceding ones (see p. 138); but on ye ground, y. ye new lease is not within ye terms of ye will.

But leases for years, being chattel int. may pass by devise, notwithstanding a power of renewal, if proper words are used for that purpose — + 2. If devise all the estate that I shall have in & at ye time of my death, ‡ & subsequent renewals does not revoke. Pow 589. 590. 3 atk 174. 177. 199. Sal 237. 1 P.W. 575. For a devise of an after-purchased chattel int. is allowed in law — (see ye case, ante, 4.)

+ wh ct not be, in ye ca. of a freehold.

‡ for all ye cases, ye I shall see page of.

So if the renewed lease is not completed at testator's death, the devise is not revoked by the surrender. Ex. Where Expos. deed was not executed, till after testator's death — no revocn. Pow 592. S. 2 atk 593. But ye can hold only in Chy, I trust.

Revoc. as at Com. law. (implied.) (Alter. of est.)

Devise.

And when the revoc. depends on y. possible fact of an alter. in y. Est. (indepen. ently of any supposed intention to revoke), there must be an actual & substantial alter.; or else no revoc. — Thus, it was formerly holden, that if one dev. land in fee, & afterw. conv. to convey to a Stranger, the dev. was not revoked by y. conv. — Pow. 593. 1 Rol. 615. 1 Vt. R. 349.) Eqty, being but an executory agr. to convey, not an actual conveyance, it wrought no change in y. Estate.

But now, as Cts of Eqty consider an executory agr. to convey land as an actual conveyance, such a conv. or agree. will in Eqty be deemed a revoc. if y. covee has a right to a specific performance (Pow. 594. 5. 2 P. W. 329. 624.) Alter at law.

Revocn of
Com. Law.

(inblied.)

(Heir at Law of 2d Co.)

Title by

But a dev. of the equitable int. in a trust-Est. is not revoked in Eq. by a change of the trustees.- Yt. Testator gives trust, having dev., causes his trustees to convey other trustees, to the same uses: No revocn in Eq.- Contrary no alteration in the (thing) dev. - i.e. yt. Equitable Est. - (Pow. 595. 8. 152. R 23. 2 Ves. 609.) - Hunt, 27. - Tho' yt. legal estate is changed.

So, if one, having cond, or contracts, by articles, for the purchase of Land, devs it & then completes yt. purchase, this is, in Eq. + a revocn - the Equitable int. not altered. It is only "taking yt Est. home". (Pow. 596-8. Dorg 691. 684.) The equitable int. was in the devr. (yt sold) at the time of devising; yt that is not altered by the acquisition of the legal estate.

+ of yt prior devr

In both yt above cases Eq will support & enforce yt devise. - Heir at Law. The subject of yt devt being a mere equity.

Revoc.n at com. law (implied) (alien. + dissol.)

Devise.

So if mortgor, having devised, pays up the mortge, & in lieu conveys the legal estate to a trustee for mortgor, this is no revocn (Doug. 684. & 710. Pow. 597.) — It amounts only to a change of trustee: the equitable int.t remaining, as it was at the time of the devise made.

And it is. laid down, as a gen.l rule, in equity, that if one, having an equitable int.t in fee, devises it, & then takes a conveyce of the legal estate, the devise is not revoked: no alteran in the estate devised. (Pow. 599. i.e. the equitable estate.
Ibid. 311 3 P. W. 170. 2 Vern 879, 1 Rol. 616. 7 T. R. 417. n.

where several instruments taken together constitute but one conveyg, a devise made in the intervening time, between the exn of the first, & the completion of the last, is not revoked — for all the parts take effect by relation to the first instrumt. conveyg made to operate a recovy. than a devise. (Pow 600 & 1 Ves. S. 251. 2 Bro. 1131. 4 Bur. 1902. 1 Ves. S. 396. Fo. 405.) — The reason, why there is no revocn in this case, is, that the recovy relates to the orig.l conveyg, & that was before the devise (Ante, 116. 99. — Deuch. 42.

+ by exn last —

+ to himself.

Ante, 142.

148.

Revoc. of at com. law (implied) (Alter a. of 6.)

Title by

A partition between two Co. in com. or coparceners, if confined to that object, is no revoc. of a previous dev. by one of them. — It is not an alter. in dev. Est. — it merely ascertains what before belonged to him. (Com. 302. Cay 240 3 P. W. 130. n B. — (3 Reb. 357. 2 Vid. 90. cont.

specific part of the same

But if the deed of partition extends to any other object, than that of partition merely, it will make a previous dev. + — &c. If it contains any further disposition of the Est. (Bro. 553. 1 Vern. 309. 3 Ath. 742. 745. 752.

+ made by one of 2 tenants.

Revocn at
Com. Law
(implied.)
(Attn: of Exr.)

Devise.

~~Case of the Bad of petition extinct by~~

~~Doe~~ - Where a Te has made an actual
alterⁿ in an Estᵉ before devⁿ, no parol
Evᵉ is admissible, to shew, that he did
not intend to revoke. - (2 Vo. Ca. 516. 3 Atk
741. 2 Ves Jun. 417. 595.) - For the revocn
is not founded on a suppᵈ intent to re-
voke; - it is a conclusion of law -
a positive law - presumptio juris
de jure. - (Co. Litt. 112. 141.) - It is, in its
nature legal & strict, a revocn, indepdently of
Testrs intention.

Intermediate Actsa

Secondly - Acts in pais, accounting
to an implied revocn of a prior devise, may
be, by an intended alterⁿ in the Estᵉ
devⁱ - as if devr attempts a disposi-
tion by wayt of
tion, which is ineffectual, either for
want of formalities, or of capacity
to take, in the person, to whom, &c. (Jones
The devise is prima facie revoked
005. 505. (Dyer) - This rule is founded on
yᵉ presumed intention of Testr (Id)

#Acts of a sub-
sequt ineffectual
device or alienn
shd exhibit an
absolute change
of yᵉ Estᵉ, in
2. Le Pos & 10.)
yᵗ does not con-
attempt a change
in yᵉ Estᵉ, to take
place between yᵉ
reception & con-
summation of yᵉ
devise (Ante 138.) - The intention to revoke, is, therefore conditional; i.e. de-
pending upon yᵉ substituted dispositions taking effect.

157.

Revocat. of Comm. (in blind) (intended deter.)

Title 67

Eq. Pr. One having dev. land, makes a deed of settlement of it, without livery of seisin - (Pow 606. Mo. 429. Popl 108. 1 Roc 615. 3 Atk 72-3. 803. 1 Ves. 340) - Or, having dev. a rev. makes a grant of it, but ye tenants never attorn (Pow 606. 1 Roc 615.) Or, having dev. conveys by Deed of bargain & sale, not enrolled within 6 mo. - (Pow 606.7. 1 Roc 615. 1 Ves 178. 187. ~~so knowing that a deed not enrolled could not pass it, but the tenants attorn~~, (Pow. 606. 1 Roc. 615.) - ~~Or a~~ These & simil. Cases are thus reconcil^d, viz^t, to revocations. =

= For such attempts to convey, in pursuance of ~~a former~~ intention to revoke. (Pow 606.7.

But -
Revocat^y Uses & Trusts, being found on a presumed intent to revoke, (Ryan) the inference may be rebutted by parol evid^ce - (Pow 607. 8) - As where Dev^r on executing a deed of settlement to his own use declares his intent, not to revoke. (Pow 608. Dav. 76. Doe b. Bz. + Ante, 37.

+ an ineffectual

And note, ye parol evidence does not contradict, or vary either ye terms, or direct legal effect of ye deed; but goes merely to disprove a supposed ex trinsic circumstance, viz^z an intention to revoke.

Devise.

Devise at Com. Law—impl.

(Vestmans devise.)

So, by an attempted alter. which becomes ineffectual, tho' in incapacity to take, in the person to whom it is made.

Ex. One having dev. to A. after dies, devises to a Corpor. # This is a revoc. tho' the corpor. cannot take. (Plowd. Comm. 35. 1 Roll. 615. 4. 5. 27 Eq. Ca. Ab. 359. 1 Bro. C. C. 450. 9 Mod. 193. 10 H. 237. (vid. Bro. Dev. (E.))

For y. last dev. tho' inoperative, yet, such implies a change of intent.

So, of a subsequent ineffectual grant to one, who cannot take. E.g. Grant of Subsist. dev. # whole Estate to his wife. (Bro. 620. 3 with 72 Just. 2. Law, cannot take by grant from her husband.

Here, tho' the wife takes no thing by the devise, who takes nothing by the subsequent grant, she not being capable of taking by grant from her husband, yet the equitable operation of the original devise in favour of the wife, will be supported. (Bro. C. C. 3. 2. Atk. 2. Ves. Jun. 4. 35.) So in Ex. there will be an absolute revocation, as to y. part.

So a subsequent alter. in the Estate dev. working a revoc. may be, by the act of a Stranger. Plow. 511. 184. 5. 560. 574.

As if one, having dev. is disseised, & dies before re-entry. (Plow. 511. 184. 6. 566. 574. 1 Roc. 614. Hob. 348. 11 Co. 5. a. b. Cont. 45. 135.) Qu. in Comm? The rule, I suppt, is not altered law here.

Title by

Revocn. as to Exn. - (By diversis)

~~In the effects of deposition, & the distinction &c, &c~~

But a Stranger cannot revoke a Dev. by tearing or cancelling it - if it remains legible. (Pow. 612. 852. 2 Com. 441. ~~Pow.~~ - Pow. 152. ~~bis~~) - Supp. it not legible, but y. contents known & provable. - S. R. in C. in y. ca. of Capt. Smedley's will, y. when y. will was destroyed by testa. himself, while insane, & parol evce was admd. to prove y. contents & y. will established. Hue y. act was in legal effect, as y. of a Stranger.

3 Brown. Ward 49 3 B. & Ald. 489.

By revocn. of law

Again - By alterns in the Rolls devised, amounting to a revocn, may be by mere operan. of law; - Ex. Devises made (ante, 38) by tenant by curtesy not consummate, before the Stat. of uses were revoked by that St. (Pow. 612. Dy. 142. a. 143. b. 1 Roc. 616. 2 Vrs. 419. ~~Page~~) For y. Stat. turns, invest y. legal estate, (w. was not then devisable) in y. cestui que use: and by consequence from, destroys y. incipient quality of y. latter. - Swift 2. 56-7.

A Dev. may be revoked absolutely, or conditionally - in whole, or in part only. (Pow. 614. ovr. 70.

Revocn. by an Inter. Conv.

(Conv. by Codicil & Partial)

Absolute & total Revocns. have been already considered.

Of 2nd & partial revocns:-

A mortge. in fee, tho' at Law an absolute revocn. of a prior dev. of the land, by mort, is now considered in Eqy. as only a Condl. revocn. pro tanto - i.e. to the amount of the debt secured. So that, if dev^e will pay the debt, he may have the land. Pow. 514 &c. Rob. 617. Dy. 143. b. n. 1 Vern 329. 2 Ch. R. 154. Gal. 158. 3 Atk 748. 805. 2 Vern. 988. 2 P. W. 329.). (So, if the subsequt. disposition were an absolute conveyce to a creditor that he might sell the land, to satisfy the debt, & acct. with testa. for the surplus, it wd. be a revocn. pro tanto. Pow. 519 &c. 2 Atk. 148. 272. Pr. Ch. 32. 2 Vern 241. 3 P.W. 344. 1 Eq. Ca. abr. 405. 2 Freem 117.) - For y^e conveyce tho' absolute in form, is substantially but a Mortge; & y^e int^t of y^e mortgee under it is regarded, in Eqy, as personal. The reversion in fee remaining, tho' there is the reversion in fee remaining in y^e land also, y^e purchaser as to y^e beneficial int^t is not known. It is, substantially, like a mortgage to sell & pay.

But if y^e land were actually sold by grantee, before testa's death it wd, doubtless, be a revocn. - Would devisee be entitled to y^e surplus of y^e proceeds?

+ Debtor dies when mortgagee being dispossessed, a revocn.

++ For a mortgee is regarded in Eqy. as a mere pledge of y^e land, & has only a personal title, in way of security for a debt (& the mortgagor's int^t remains unbroken & entire in fee), is regarded pro tanto as owner. See Ellis. Ca. 26, 23. 20. 54. 12. ; & alteration of y^e purchase.

+++ testa. dies before a sale made;

Revocn at Law. — (Contd. from Partial.)

Title by

But a mortge for years ~~only~~ is, even at law, ~~only~~ a revocn of a devise in fee for the time. The reason applies — in Eqty it is only a partial revocn pro tanto: so that devisee may take immediately, on paying the debt. (Cow 617. 8 Ves. 156. 7 D. R. 410. 3 Atk 748.) (Ex).

Mortgages, 13.

But a mortge, whether in fee, or for years, is an absolute revocn as well in Eqty, as at Law, of a prior devise ~~of~~ made to the devisee — Devisee of mortgagor cannot at the same time be mortgagee of mortgagee (Cow 518. 819. Pre Ch. 514 — ~~Parker, 1 Eq. Cas. Abr.~~)

+ at the same time.

Ld Eldon 5 Ves. Jun. 656. that even a mortgage in fee, is no revocn, (¶ 3 Ves. 41. 60.) "Mortgagee p. 13 — Does Quere. — Is not the latter the better opinion? The former seems artificial, & tends, ~~rather~~, to defeat the intention of the testator.

‡ and yet devisee will take ye absolute title.

Partial revocn

~~Revocn pro tanto~~ may also operate, by diminishing either the quantity of int. or ye subject matter devised. (Cow 623. 4.

1. Thus, if one devs in fee & afterwd during his leases to a Stranger for life, the devt is revoked only quoad the estc for life—i.e during the life of lessee—not as to fee Pow 624. 625. (Roe. 616. Cro C. 23. (~~infra~~ Ante, 5. 12. a.) — So far only is ye latter ~~devt~~ inconsistt wt ye former, & ye origl fee remains in testr, at his death.

So if one devt wa estc on condn & afterwds wt exchange the condn; the condn only is revoked, & the estc devt is absolute—Pow 624. (Plt. 65

So if one devt to A. in fee, & afterwds by a Subsequt instrumt, make a devt of the same land to A. in tail; the 2d devt is a revocn of the former, to the extent of the difference between the two estates (Pow 624. 5. Comp. 90.) i.e. A. has an estate tail. ~~by the 1st devt but~~

Revocn at Com. Law – (Pow.rs, & Particl.)

Title by

But tho' a Lease to a Stranger is ~~only~~ a revocn only of ye term, & ~~not of the Land~~ of a former Dev.e; sup.a yet a Lease to Dev.ee of the Land Dev.d said to be to commence from Devisor's death is a total revocn. – The thing Dev.e Lease in consid.n as the person, & to be, at the same time, Exr, & ye execution of Devise. (Pow 626. Cro. J. 49.) – ~~Cont~~ ~~Contra~~ vid. 6 Ors. Jr. 656. 3 Kr. 417. 600. Cont. ~~(illegible)~~ & ye Exrs is no revocn. Say.t ye Term will pass, under ye Exrs, by exclusion of Creditrs – & ye Exrs under ye Dev.e, subject to specialty-debts, & or in ye state, to all debts.

But a Lease to Dev.ee to commence in Dev.rs life-time (upon account to ye old opinion) is no revocn (Pow ~~not so Harrison~~ ?). for it may determine before Dev.rs death, & so stand as to ye Dev.e Pow 626.7. Cro. J. 49.) & then if it does not, it will revoke, only quoad ye residue of ye term, at testr's death. + (Pow. Litt. it, according to ye ~~Cas.~~ 3 Rep. 25. Hom. ~~to comp~~ ~~Will not ye Exrs by disposition & ye Exrs to ye Exrs, for the best Opn.~~

+ Accdg to ye Cas. in 3 & 5 Rrs. & it cannot affect ye Dev.e, at all.

2. As to Revocations diminishing the subject matter.

Rev. as at com. law:- (Cont. C. Bk. Real)

157

Devise.

If one devises 3 manors to A. & then revokes as to one of them; the dev. remains good, as to the other two. One Devises lands to his daughter, & afterw.ds on her marr.e, settles a part of the same land upon her in pursuance of the dev. as to the residue, remains. Pow. dev. 8. Rol. Ab. 617. 2 Vern 720 1 Eq. Cas. Abr. 412. 13. 2 Vern. 771. 12. 2 Atk 208. As to 3rd, cont. not comprehended in 1st subsequent disposition, 1st dev. remains in statu quo.

III. Of Revocation under the Eng. St. of Frauds, 29 Car. 2. — (Rev. 121)

Pow. 120, 130 By this Stat. enacts that no devise shall be revoked, otherwise than (1st) by some other will or codicil in writing or other writing declaring the same — (2d) by burning, tearing, cancelling or obliterating the same — but unless the same be altered by some other will or codicil in writing, or other writing signed in the presence of two witnesses declaring the same. 3rd (Note the requisites, prescribed in the devising Stat. Pow 47. 8.)

+ by 1st Vict. Chap. 26 sec. 20 no Will shall be revoked by Marriage — except "since the Act it is declared Contract —

Revoc.as under the Stat. 29 Car. 2.

Title by

Holden. That this clause of the R. extends, not only to devises of land, strictly so called, but also to legacies, or sums of money, charged upon land. Both to be resolved in the same way. (Pow. 630. 2 Atk. 272.) — A charge upon land, being, in effect, a devise of an int.t in it, by virtue of the charge.

It does not affect in point of revoc.as — alter.n or such as are effected by a subsequent inconsistent disposition — (marr.e & birth of a Ch.d &c. — It affects express revoc.as only: (Pow. 630. Cas. Ld. 61.) (The former remain as at Com. Law). — ~~Words is, must be, is true construction~~ The words declaring the same," in the first Provision by implied revoc.as by Cunning &c. remain, as at com. Law, for as to these, 29 Car. 2. int.roduces no new rule. It merely affirms the Com.l rule.

Revoc.as under the St., then may be, by some other will, &c. (as prescribed in the first branch of the clause) — by burning &c. or, by some other writ, &c. (as prescribed in 3.d branch), Pow. 631.

* These remain as at com. law.

Words [illegible] relevant to the obscure law as to subsequent testamentary dispositions in execution of a power, revoc. in part, 1 Ves. P. 340. 3 Wils. 73. 5 Bro. P.C. 184.

Plainly limit the 2 clause of 29 Car. 2. revoc.as

+ as provided in 1.st clause of

++ a new will

Revoc. by Wills, &c.
Stat. 29 Car. 2

Devise.

In pointing out the two first modes of revoc. the Stat. seems to be only declaratory of the Com. Law, (Post, 182.) — Except, that y. words, "will or codicil," in the first branch of the revoking clause, are construed to mean accompd. w.t such solemnities, a will, or codicil, as w.d be suffic.t to pass Lands, within the prior devising clause, (Post, 647-8.) — (Then ~~the words~~ ~~the devise of Lands~~, ~~not~~ ~~complying with it, w.d be void~~, & ~~the testator~~ ~~devise~~. (P. a 632. 3-4.) — ~~The~~ as y.e first branch of y.e revoking clause contains y.e same words ("will, or codicil") as y.e devising clause, it does not prescribe diff.t requisites, as any requisites; y.e same requisites must be intended, as are prescribed, in y.e devising clause).

(Whereas, the instrument, contemplated by the last branch, [~~containing expressly, or impliedly, by the words, "&c." the whole of the devising clause~~], is construed to be an informal (~~revoking instrument~~), not requiring the solemnities, prescribed in the devising clause: ~~it will not be valid~~.

~~(and the first & last branches together~~ For y.e last branch of y.e revoking clause, not only does not prescribe y.e same requisites, as y.e devising clause; but expressly prescribe diff.t requisites, & diff.t ones only: And for y.e reason, it cannot contemplate a devising instrument (or one conforming to y.e devising clause); & must, of course, contemplate a revoking instrument only.

* i.e. y.t y.e writ.n sh.d subscribe in Testa's presence;

** (i.e. y.t Testa. sh.d sign in y.e presence of y.e witnesses.

Rec. v. Pulteney 1 Str. 2 Geo. 2.

Title by

Hence a distinction between an instrument, intended merely to revoke a prior devise, & one intended to make a new disposition of the same land, & also to revoke, wch is contemplated by ye first branch.

+(wt is provided for by ye third branch) –

The former, (i.e. one intended merely to revoke) will be effectual, if it comply with the requisites, prescribed either in the devising clause, or, with those prescribed in the third branch of ye revoking clause; – Both the requisites – Pow 647, 8.

+Or, of course, an instrument having ye requisites of a will or codicil, (as, prescribed in ye devising clause) will

+be effectual as an instrument of more recent date, tho it has not ye requisites prescribed in the third branch of ye clause. ~~& if it comply with the requisites of ye devising clause only.~~

~~Or if it comply with the requisites in the devising clause only~~ (tho a revoking instrument only), it is effectual according to the first branch of the revoking clause. (Pow 631. 647. 8.) Ex. gr. A revoking instrument subscribed & published in ye presence

And if it is attended with ye requisites in the third branch of the revoking clause, it is good as a revoking clause (Pow 647, 8. 1 P. Wms 643. 665. Pr. 62. 465. 10. Mod 67.) ex. gr. An instrument of a recent date signed in ye presence of 3 witnesses.

~~+third clause~~ +clause, as containing ye requisites of ye ~~clause~~ third branch of ye clause.

It is a gen.l rule, that

But, è contra:- If the latter in[s]trument is intended to be both a disposing & revoking instrument; it will not be effectual to revoke, unless it conform to the devising clause; i.e. unless it is attested, as to sta: presence &c.+ - For the intention is, (~~to give both the devise~~ ~~devise is taken from the latter~~ rather) to take from the first devise only what is given to the second: But nothing is given to the second: ~~&c~~ &c (Dow 648. 632. 3. 639. 3 Mod 258. Carth 79. 1 Ld. Ray. 349. Pre Chy. 549. 2 Vern 741. (Carth 79.) 2 Salk 592. 1 Eq. Ca. abr. 409. (Prec. in Chan. 15.; 14.

The result then of y.e preceding rules is, that if a devisor intends a mere revoking instrument; he may make it effectual by complying w.th y.e requisites, prescribed either in y.e first, or third, branch of y.e revoking clause: But if he w.d make both a disposing & revoking instrument - for, if he w.d revoke by making a new & diff.t disposition of y.e property before devised) he cannot effect ~~this~~ his object without conforming to y.e requisites (prescribed in y.e first branch of y.e revoking clause - i.e. w.th those of y.e devising clause.

But a devise to sta: heir at Law, tho' void, revokes a former dev: ~~of the same~~ (Mod 17. -) (Carth 23. 15.) - For y.e requisites of the stat. being complied with, the revoking effect of the latter will must prevail. And y.e heir will take y.e estate - by descent. Indeed all that is necessary to a revoking & disposing instrument, is, that it conform to y.e limitations of a devising one - whether y.e dev: be certain, or not.

+ unless it is effectual to dispose.

+ unless y.e devising clause is complied with:

Thus, no thing is taken from y.e heir by the Last: the Last devise remains in force: Carth. 79. < Ex. 2 First dev: to A. - & a second subsequent devise of same est: to B. containing a revoking clause, but not subscribed in testa's presence, tho' signed by testa: in presence of 3 witnesses.

+ as a disposing instrument, it is void, & the heir will take as such,

Revocn under 55 Geo. 4 & 2 Vict. c. 2.

Title by

But a disposing & revoking instrument need not comply with the requisites of both clauses. If it conforms to the devising clause the revoking words are effectual as, within the first branch of the revoking clause. (Indeed, if good as a disposing instrument, it is effectual to revoke by implication, without words of revocn - i.e. & will revoke, as at Com. Law, as a subsequent disposition inconsistent with the former one. (Ante 124.)

~~- Judy if it conforms to y^e third branch of y^e revoking clause; it is effectual, by y^e words of y^t clause~~

As to Revocn by burning cancelling, tearing & obliterating:- Revocn ~~of~~ ~~striking~~ remain as at Com. Law. Pow. 631. (~~Repeal~~ Ante, 152.) - (~~The framing the~~ must be in the testr's presence & in his ~~presence~~ & in accordance ~~& consistent~~ Pow. 629. 630. 631. - Ante 152.)

To effect a revocn in either of these ways, it is necessary, that the burning &c be by testr, &c in his presence, & by his direction. (P 629. 630.) - Hence, if his ~~act~~ no revocn i.e. if it remains in intelligible (Pow. 652.

(Ante, 152. - 4.)

(55. Suppose the Dee destroys:

Revoc.n under Stat. 29 Car. 2.

Pla. Comp. 83-4. Evidence, 39-40.

Devise.

May the contents be proved? There is no such case, I believe. But Note the analogy to Deeds, Lost, or destroyed by time & accident. (3 T. R. 154, 2 Ke. Ch. 283. 4 Wils 16. Stra 1180. - Note Goodtitle ex dem. Hindley's wife, ante, 152, lately decided in y.e State.)

Revoc.n effected by these acts, are in the nature of implied revoc.n at Com. Law. Hence, the acts themselves (tho done by Testat.r), are not considered, per se, as revoc.n - but as furnishing ev.ce of a revoking intent. (Pow 633, & Comp. 52. 1 P. Wms 346. 3 Wils 508.) (But see sometimes called "outward or visible signs" of such intent. -

Of course they amount to revoc.n, or not, as they are done or not animo revocandi. Thus, if dev.e Sh.r throw it into fire instead of burning, or his dev.ee - or, having two, Sh.r by mistake cancel y.e latter instead of the former; there wd be no revoc.n (Pow 634. Comp. 52. 1 P. Wms 346. 3 Wils 508. 4 Burr. 2515.) if y.e contents of y.e latter cd be ascertained.

154.

Title by

But it is not necessary that y. deed be totally destroyed. Even the slightest tearing of it will be a revocation if accompanied with a declared intent to revoke. As where one slightly tore his deed & threw it on to the fire, but it fell off & was taken up - but he declared, that it shd. not be his will. Pow 635. b. 2 Bl. R. 1043.

So if there are duplicates of a deed, & testator tears or cancels part animo revocandi; the whole is revoked. - (Pow 637. 634. Com. 653. 10 Co. 346. 2 Vern. 742. Comp 49. Cro Ch. 460. 1 Ves Sr. 404. For both constitute but one will.

Revoc. by wills
stat. 29 Car. 2

Devise.

Such acts, depending for their effect on testa's intention, amount, in some instances, only to "dependent, relative" revocs.† ×
i.c. When done with reference to another act, intended to effect a new disposition, their revoking effect depends upon the efficacy of the other act. Powell 637.

†(or more intelligibly, cond.l revocs.)

Thus, when one, thinking, that a new dev.e of his Estate was completed, when it was not, tore off the seals from his first dev.e - & or being informed otherwise, insisted & said "he was sorry" &c. & never completed his subsequent dev.e the first was, not revoked - (Powell 638. 1 Eq. Ca. ab. 409. 3 Ch. R. 155. 1 P. W. 343. 2 Eq. Ca. ab. 778. 3 Vin. 140. Com. 405. 4 Burr. 2515.

Note the analogy to the cases of devising & revoking wills. Ante, 15.

Now, y.e Lawd will not only extend y.e presumption arising from y.e extrinsic act of tearing off y.e seals.

165.
Execn. & revocn.
Ch. 23 Sec. 2.

Title by

A will, obliterated in part, by testr. animo revocandi, may be good, as to the rest. — Thus where one, having devd. all his Estr. to A. except 10l. afterwards struck out the exception. the part, not obliterated, remained good. Pow. 649. Cowp. 812. — Ante 165.

An instrument, made under powr. having clauses of the Stat. is not valid, tho' testr's. signature is on the face of the instrument; unless it was intended to authenticate the revoking part. Pow. 649. & 2 Lev. 86. — Ante 165.

~~To what~~
~~Re-Execn. or the subject of revocn.~~
The rules of Com. Law & gen.ly apply here. (as to implied revocn.)
2nd. as to revocn. by Parol. (Ante 164.) — Held, — that it was proper, that the Jury should be directed on the part of the Plaintiff, that the Testator's intention must be collected from the whole instrument, & the circumstances under which it was made?
R. in Ex. however, that independent acts of the Testator, & parol revocn. is valid. 5 Com. R. 164. 2 L. C. 65.

† Now in y. State, in pr. to Stat. of 1821, no devise of a devisee by otherwise y. by burning, cancelling &c. &c. by some other writing or codicil, in writing declaring y. same, signed by testr. in presence of 3 or more witnesses, & by y. attested in his presence

~~Devise~~ Com. Law

Devise

Of Republication

A Devise tho' revoked, may, if not actually destroyed, be revived by a subsequent republication. For being ambulatory till testator's death, it may as well be confirmed or revived, as revoked. (Bac 652.) In other words, the revoking act is itself revocable.

And before the St. of frauds, as particular as were sufficient to revoke (ante, 12.); so they were sufficient to republish & adv. (Bac 652.

II. Of Republication at Com. Law. III. As they stand since the Stat. of frauds & perjuries:—

II. At Com Law republication was much favoured; of course any slight words would effect a republication (Bac 652.3.

Vt.
Republished
Contra

Title by

Thus if one, after having made a dev.: of his land, sh.d purchase other land, & then verbally declare it was his will; deliver his title, it w.d be a republic.n, & the land, so purchased, w.d pass by it. (Pow 652. 655. 654. Dy. 190. a. 6. 1 Rol. 618. 47. Sh. 344. 416. 2 Show 48. 1 Roll. 82. 3.

So, if one, having devised all his land to his Ex.r & afterwards purchased other lands, sh.d be applied to, to tell y.e latter, & sh.d reply "No, they shall go with my other land to my Ex.r;" the dev.: w.d be republished, & w.d pass the lands, thus purchased. (Pow 653. 4. Cro E. 493. Mo 404. 2 Ch. R. 72. 3. 1 Freem. 264. 2 Vern. 209.

And according to ye report of the case cited from 2 Ch. R. the bishop saying, on an application, as supra), "My will is in a Box in my Study" was held insuff.t (Pow 655. 2 Vern 209.

Republica'
& Com. Law.

105

Devise.

So, these words "My will in the hands of J.S. shall stand", have been holden sufficient. (Pow 655. 2 Shep 48. - Prid. Rol. 617. 2.1.

So any act subseq. to the revoc. of a dev., & shewing an intent that it sh. remain in force, wd amount to a republica. Pow 655.6. Rol. 617. 2.1. - Eg delivering it, (see before y. Stat. of frauds), in token of such intent -

So, tho' a subseq. feoffment to the use of feoffor's will, was holden to be a revoca. (Page, 142); yet the reference of the feoffm. to the dev. was holden to be a republica., & thus to give it effect. (Pow. 582 655. Rol. 617. 2.4. Coup. 130 - (Page, 142. 7-4.) The feoffm., then, had y. double effect of revoking & republishing. - (Pow. 2 to 4 inclusive) (Addition since y. Stat. of fr. & inf. - by y. rest of feoffment were executed according to y. Stat. of Uses.

Revocation at Com. Law.

Tittle by

But the ~~subsequent~~ appointment of new Exs. & giving of a Legacy, was held to be a republication of a prior dev. of Land. (Pow 656. 1 Rol. 618. 8. Paper that not be in Com. Law: the case is peculiarity of Ly.

~~And~~ It has been holden, however, that the mere add. of a codicil, taking no notice of the dev. will be a republication at Com. Law. - Because the may not shew that the testr contemplated the dev. as then subsisting. (Pow 584. 657. 673. 668. 3 atk 180. 3 P.W. 168. 2 Vern. 209. ~~(Cont. Cro. Eliz. 490. 2. C. Rep. 618. 8. 2 Ld. Ly. Cas. 606. - also the codicil must be good etc.)~~ - As a codicil is a relative thing, always pre-supposing an existing will.

R. contra if y. codicil relates only to goods. 2 Co. C. 492. S. C. 1 Roll. 618. 8. S. C. 1 Ly. Ca. Ab. 40. 8.

~~But~~ The better opinion seems to be, that the mere add. of a codicil (in the Exs. of one, not initially in a will) & tho' it relate to pers. prop. only, will

at Com. Law,

amount to a republicn. of a devise. For it is a further part of the last will, whether ~~expressed~~ in fact to be so, or real (& exp. furnishes conclusive evce. of test.rs consideration his will, as existing) and being ~~a~~ an addn. to it, is, of course confirmation of it, so far, as it does not revoke.- (Pow. 608. 1 Wms. 485. ~~as to the 2d indorsement~~ ~~of Jones~~ and Pow. 661. 2 Com. Dig. Devise. 489. 442. 3. ~~Jones~~ Cases Rep.

*Ch. J. Hardwicke in the case of Jones vs Nicholl. 174 1 Wms. 501. 175. 2 Vern. 555. 2 Salk.

At any rate, a codicil which is annexed a codicil, ~~to the 2d part of the will~~ & so incorporated with it, & expressly confirms the devise, will be a republication (Pow. 658. 661. Com. Dig. Devise. 88. 1 Wms. 443. 3 P. W. 329. 1 Wms. 489. 493. Cowp. 158.) Ex. gr. "I ratify & confirm," &c.

+ at Com. Law.

And it seems, that any words in a codicil shewing an intent to confirm + the will, amount to a republication. (at Com. Law) 4. "I devise, that this writing may be a further part of my last will & testament." (Pow. 663. 4. 608. 1 Wms. 489. 442.

+ a prior devise.

Republic^a since Stat. of Frauds.

Title by

III^dly Of Republic^a since the St. of Frauds.

Neither the Engl. St. of Frauds, nor our own, makes any expr. provision, with respect to the republic^a of Dw^s.

+Or making a will, de novo;

But as the effect of a republic^a is the same as that of devising, + Post, 170.; it is held, that no codicil or writing, can now amount to a republic^a of a dev^e of Land &c. unless it comply with the forms prescribed by the St. - i.e. unless accompanied with the requisites of a dev^e (Bro. 80-2. 664-6. 686. Prec. 329. 2 Ch. R. 154. 1 Vern. 162. 2 Eq. Ab. 440. Gilb. 28. Barnad. 192.)- Parol republic^as then, + are at an end. (Bro. 664. 5. 686. Prec. 329. Comb. 84.

+ under the Stat.

Same rule in Con. (4 Bay, 7.- Acc. in Supr. Ct. 2d Cy. Augt. 1800)- (cont. Root, 82-3.)

Re-publication since
Test. signed &
paid.

Devise.

"This Codicil" (says Powell) can amount
to a republication unless it comply with the
"forms, &c. "to be signed, & published by Testa-
"tor in the presence of 3 witnesses." Powell
664. cites Com. 381. 2 C. Ecc. 160. 9 Mod.
68 Holt 148. 252 – (ante 22.) – 1 Vin. 440

Qu. Must Testa. sign in the presence
of the witnesses? – This not necessary
in the origl Case (Page, 20.) The cases
cited from Com. do not warrant the
position: In the ca. in Com. & Mod. & Vin.
the Codicil was thus
executed, & holden good; but such not
adjudged necessary. – And it is intimated,
perhaps,
in the report of the ca.
in Ld Raym. & Holt, to be taken for granted,
that the Codicil was written
in Testa's presence. For there is no
point made, & no notice taken, of the
Witnesses attesting Testa's signing in their
presence, & their subscribing.
in his.

(Must be republished.)

The Codicil, if indeed, be published
in the presence of the witnesses:
(Powell 664. (Com. (ante 22.)): But
to make it to be signed in their presence
is not necessary in the devising
circumstance. Vin. Testa.

But if a republication is to be
a new devising, it must be executed
with the same solemnities as
the original Will, & not be re-
commanded as the
requisite, prescribed in the devising
clause of the Statute
by an attestation in the
Testator's presence?

For caution's sake
at least two publications
& republications should be
made in the presence
in their presence.
But qu. if such
is necessary in law?
Is not a publication
in the presence of
others to be sufficient?

Rt. to Est. from Est. Laws, 4.

Title by

Decided in S. that a parol republication is not good. (Sup. Ct. Aug. 1800. Title by Cy. - 1 Root, 82-3. cont. D. 1783.

But the operation of this Stat. does not extend to implied, or construct. ive republic.ns - as y. revoking clause does not to implied revocs. (Bac. Abr. Wills, I. 2. 6. 7. Ves. 666.) So a subsq.t dev.e republishg revoking a prior one is still operative, y.t a dev.e is revoking, is not [illegible] (Ante, 129.) stands good. - Sur. says, it is a "republica.n" - Lu. does y.t revoking gives it, in effect, a new date? as republic.n does. + [illegible]

+ Is there any such thing as an "implied republica?" (Post. 176.)

+ I should think not, but that y.r first will is much left in statu quo.

So dev.s of leasehold Ests are not affected by this St. - i.e. if term for years (Bac. 667. 586.7. 593. St. C. 25.) [illegible] for these are not "real Ests" (i.e. within y.e Stat. - Ante 2.)

Under this Stat. (as at Com. L. (Page 142) no sh. words of confirm.n are necessy. it seems, in a Codicil, to republish a dev. - It is Suffic.t if the dev. is virtually confirmed. Eg. "I desire that this writing may be a further part" &c. (Bac. 666. 663. 4. Ves. 489. / Ante 130, 171.

Devise.

So also, by the better opinion, every Codicil to a dev. (vid. 7 St. R. 140.) tho' not mutually annexed, & even tho it disposes of pers. prop. only, will amount to a republica. if Exec. according to 29 Ch. 2. Ex. One dev. his real Est. & then merely Executes a codicil giving only pecuniary Legacies, and Exec. at suff. (Pow dev. 669. 9 Ves. 485. - ~~Cumb. Rep.~~). 1 Bur. 554. Com 381. 9 Mod. 38. 7 St. R. 484. 2 P. W. 108. 1 Ves jun. 486. 7 Ves 98. - Cruise, 171.)

* The reason is the same, as in, 3. 17.

† At com. law it seems, y. codicil wd republish, tho' not so attested.

- Contra 3 Rep. Ch. 90. 2 C. 2 vern. 821. - Cases 1 Ves 489. - Pow dev. 681. Ambl. 571.

If one, having dev. all his Copyholds, purchases more, & surrenders them to the uses declared in his will, the surrender is a republica. & the latter will pass. (Comp. 130.) (But here nothing is said of the Dr. Frauds & its requisites. I suppose one not complied with. (But this seems to be an implied republica. ~~by codicil~~ in such republica. is not affected by 29 Stat. & Pages) -

* Query not by. one not otherwise in writ. by Statute of Frauds. Pow dev. 83. 5. - Cruise, 174.

Republic: time
Title by
Int. of, Construc.

The effect of a republica is, virtually, to give the dev. a new date - so that the dev. after republica, will comprehend all such property, & all such persons, as it wd. have comprehended, if originally made at the time of republica. (Bac. 674, 683. Comp. 130. 158. 13 R. R. 193. 4 R. 607.) - Whereas, a dev. not republished, wile extinct to no est., which the testa. had not at the time of making it - (2 Bl. Bc. 523. 13 R. R. 204. Comp. 130. 132. -); and is construed, with reference to the state of things, then existing.

+ Qu. how far in the republica of that? (See p. 174): Or rather, is there any such thing as an implied republica of the kind, mentioned p. 174?

For it is a
General rule, that wills are to be construed according to the state of things, at the time of making them, (1 Bl. 400. Fonb. 182. 184. 8 Bac. 225. Cowp. 29. Salk. 44. Hutt. 58)

Ante, 76. 84.

+ Since it republished, wh. in relation to the time of republica must govern.

If testators, they think
if one, having dev. "all his lands in A", purchase other lands, lying in A, & then republish, the latter will pass. (Bac. 674. Cro. E. 493. Allo. 404. Bac. 381.

Re Publica
Since 1st Ct. Lands &c.

Devise.

So, if having dev.d "all" his real est.s he purchases more land, & then re-publishes; † (Pow 674. Coo. 381. Gilb.d 78. 1 Ves. 442. Holt 748. 7 T.R. 492. 1 Wms 204.

† the whole will rep.s.

So, if one, having dev.d to his son A, who dies, & after afterwards has another son of the same name; & then republishes, the latter son will take. (Pow 675. Ct. 10. Ve. 275. 3 Keb. 847. 5 Co. 68). But without a republica.n the latter son could not take.

So, if one devises Lands to his daughter, "not to be subject to any control of her hus.d; (she then having a hus.d) & after the hus.d death, republishes his will, having notice of the husband's death; the restriction extends to any subsq.t husband. 1 T.R. 193.

‡ would not apply since the Act, if the testator were then of full age.

Republic^a
Time Stat. of, &c.

Title by

But the effect of a republic^a ex-
tends no further, than to give p. words
of the dev^r the same oper^n as they w^d
have had, of orig^y written, at p. time
of republic^a. Pow 676. + Hunt, 8.

Hence, if one dev^s land, called Black-
acre, & then purchases land called
whiteacre, & republishes, whiteacre
will not pass. - So, if having dev^d all
his land in C^y he purchases other land
in B. & republishes; the latter will
not pass. (Pow 676. 684.) - The words do
not comprehend it.

Hence also, words ~~used~~ in the orig^l
dev^r as words of limitation, cannot
by a republic^a be made to speak
as words of purchase, a description
Pow 676.

Devise

Ante, 28. Thus, if one dev. to "A. & the heirs of his body," & after A's death, republishes; A's issue cannot take. (Pow. 676. 7. 4 M. 601. Pre Ch. 439. 2 Vern 722. Plowd. 343. Co. E. 422. Ray. 408. 1 Mod 267. 2 H. 313. 1 P. W. 397. Doug 337. 1 Bro Ch. 219. n. (Ante, 28.) — The republication is of a dev. to A. (who is dead) in fee + in fee-tail. The limitation is, of course, void — ~~it is a lapsed devise~~

So, where one, having dev. land to his son R. & given a legacy to his grandson R. republished after the son's death, it was decided, that the grandson R. did not take the land. For in this case having used the word "grandson" shewed, that he did not intend to designate his gd. son by the word "son". (Pow. 676. 9. 3 Mod. 318. 1 Vent. 340. Ray. 468. 2 Lev. 243. 2 Show. 63. ~~Ante~~ Ante. 112

Note. Testator's intention is to be collected or gathered from a reference to the state of things existing at the time of making the will, not of his death. — Willis 297. Talb. 44. Bath. 581.

163.

Republication of Will

Estate by

A Codicil may republish a Devise as to part of the subject matter only. Eg. One having Devised his real Estate to two, revoked it, as to part of the Estate by settling that part upon one of them; & then, by Codicil confirmed it, subject to the settlement. Held on that the other part should go to the two. (Pow 579. 580. 2 P. W. 329.

But a codicil cannot give a Devise any inherent validity, which did not before belong to it. Its effect is to set it up, in the same condition, in which it was at its inception (Pow 580. 2. 102. 11 Ves. 6. 25. Hunter 27.)

Hence, if the Devise itself, is not executed, according to the Statute, a codicil, which is thus executed, will not confirm it (Pow 580. 2. 52. 110. Pre Ch. 270. 2 Vern 597. Garth 35. Holt, 742. Comb. 174 Salk 762. 1 Bur. 554. (Page 27.)

But it must not be inconsistent with the Devise in terms. Eg. if the Devise be to A. & his heirs, the Codicil to B. & his heirs. In this case, the Devise is revoked, the Codicil operating as an Execution to B. (Pow. 582. 1 Bur. 543. Hunter, 4. 23. 27.)

Republica ring
Exit of Hand. 4.

Devise.

Lord Hardw. once held, that if a man devd thus: "all the leases, which I now hold", & afterwards renews his leases, those renewed wd not pass by a republica. (Pow 683. 586. 2 Atk 593.)

Quere: For the words have ye same effect, as if the devr had been made at the time of republica? (Pow 683-5.

A devr may be republished by (any day) mere nuncupative; & such republica may supply an original want of capacity in devr. Ex. an infr makes a devr & after full age, re-executes it. (Pow 686. 1 Sid. 162. 1 Rol. 589. Vide Comb. 201.

An infr may republish on ye very day, on which he comes of age - no portion of a day -, (Pow 686. 1 Sid. 162. 1 Rol. 589. Reynell v Sprint 3-5.

Republic? when Sist. of, grants &c.

Title by

Nothing, which does not amount to a republic? at Law, will amount to it in Equity. (Pow 687. Comp. 132.

Of the jurisdiction of Courts as to Devises.

The Ecclesiastical Cts in Eng. Law no jurisdict? over devises of Land only. (Pow 688.)- and a prohibition lies to them prevent, from proceeding in? juris? of devises. (Pow 688. 3 Keb 30. 1 Mod. 207. Cro? Eliz 396. 2 Roll. abr. 315. l. 10. 2 East 557. 8. L? Ch? J? [illegible]

But now if the same instrument contains a devise of Land, & a bequest of chattels, it may be proved in those Cts.* – For it is necessy. as to the personal estate. – But the probate is, as to the real estate of no avail. – (not Evidence at Com. Law.) (Bro. Abr. 688. 9. 705. 703. 2 East 557. 8. 1 Rol. 315. 15 Vin. 141. Bro C. 396. Comb. 248. Ld. Ray. 732. Bro. P. 348. Wolt, 180. Sal. 553. 3 Salk 546. &c. 23.) – (as to pers. prop. it is conclusive) – a prohibition was formerly granted, to prohibit the Court. (2 East 557. 2 Rol. 315.

* Now prohibited, formerly granted, & revoked by Parl. 2 Rol. 315. – 2 East, 557.)

+ But as to the devise it is conclusive.

In C. devises, as well as wills, are proved by the Cts of Probate – But an appeal to Sup. C. lies from their decisions in all cases.+ If the sentence of Probate is affirmed, no further proceedings are had – if not, the cause is remanded with directions to the Judge to conform to the decision of the Ct. above). (Ld. Ray. St. C. 131. 134. – (Bac. –

+ In some of the States, the Ct exercising Ecclesiastical jurisdiction, is called the Surrogate's Ct – Stephen's Ct N. York. These are all prerogative Cts

But the sentence of the court of Probate is unappealed from, is conclusive. (3 Burn, 3.0.

184.
Jurisdiction
of Courts.

Title by

But there is no proof of an appeal on any Question of title to real Estate. The sentence of the Ct. is not conclusive of title in such a case. The Heir at Law may immediately sue at Com. Law, any sentence of Prob. notwithstanding. (Ow. L. Dec. 8. Inv.

The division of an Estate, testate or intestate, under the order of Prob. settling the proportions of those entitled to it, unless it is shown, on appeal to be erroneous - but has no effect on the question of title. R. L. 327. 8.

A Ct. of Eq. will not set aside a deed upon a suggestion of fraud in it (obtaining it by fraud) for if the suggestion is true, it is no deed in law (Pow 695.); & whether it is a deed or not, is a Qu. of fact, to be tried at Law, by a jury, & the issue, devisavit vel non. (Pow 170. 691. 4. 3 Atk 17. 1 P. W. 548. 2 Ves 183. 2 Atk 324. 424. 2 P. W. 270.) (1 Eq. Ca. Ab. 406. 2 Ves. 421. 3 Bro P. C. 227. Prec Ch. 123. Comyns

A trial at law, to try the issue of fraud in a deed, is not necessary to set aside a deed.

Terms of a Deed. (Pow 692. 2 P. W. 270.) For Ct. excepting of Ex. Ct., does not avoid a deed, at Law.

The above issue is often directed out of Ch., where there is a controversy of equitable jurisdiction & to enforce trusts created by deed

Cases. Relation of Devises.

Devise.

~~Similar to the question ~~ as to ~~ for ~~ devised to a Dod.~~

So, whether testat. was compos mentis, or not, is a question of fact, to be tried at law. Ros 693. 5. 3 Atk 544. 1 P. W. 288.

~~Dr. If a devise is void, is void as to ~~ part of Cly's ~~ void for ~~ Cly, does the Ct. of Chy. ~~ as to the ~~ issue being thereof, proceed to ~~ void the Dev. (the Cly being void) for that purpose? as to the proceeding in Eqy. ceased? Ros 6 936. 5. 2 Atk 324.~~

But there is a distinction between Cly's setting aside a devise for fraud & its taking from the devisee the benefit of a devise procured on a confidence, which binds his conscience. The latter may be done: For here, the

Title by

existence of the dev: is not questioned;
but the Ct, ~~from~~ from
~~compelling~~ the dev: * as
holds for the benefit of the party aggrie-
ved. The ground of jurisd: is distinct
from that over the dev: itself. it is
over the conscience of dev: (Pow 696.
Hob. 109.) — & y: Ct will, by a decree, com-
pel him to release to y: party equitably
entitled to y: premises. — (& y: heir at law.) —
thus arising in affirm: of y: dev:

* only as trustee,

Ex. gr. A. agrees & give B. $1000 in bank
bills in consid: of B's devising land to
him, & the bills are forged; A. maybe
made a trustee for B's heir, for the
breach of confidence, which in Eqy.
is a fraud. (Pow 696.7. 10 R. W. 788. 2
Vern. 699. 700.

Ex a similar principle, it is holden,
on the other hand, that if one, being
about to provide by dev: for his
younger children, is dissuaded from
doing it by the heir promising to make
the same provision; the heir is compell-
able in eqy. to perform his agree:
(Pow 697.8. Ru 2d. 4. — Fraud
Here, there is no dev: & fraud will, nevertheless,
be prevented in eqy.

* to y: younger children;

Devise.

And where ne dev^r land to be exchanged for college lands, for dev^e: but the college w^d not in ch^y. Chy decreed that A. shd have the land intended to be exchanged. (Pow 699. 2 ves. 554.) The decree only gave A. y^e value (in real est^e), but y^e testa^r designed for him.

In gen^l questions, arising purely on the words of a dev^e are to be decided at law. But Chy may decide questions of this kind, if there are circumstances, or opinions equitable in the case. (Pow 699 &c. 3 P. W. 290.) ie. if any claim, merely equitable, is asserted under, or against y^e dev^e

When the issue, devisavit, vel non, is directed out of Chy, that Ct. may the mode the ev^e & direct the application of it, so that a fair investig^n may not be impeded - Eg. The Ct. may direct, that one of the parties shall not set up such or such an unconscionable defence - or, that he shall admit in ev^e a copy, instead of the orig^l dev^e &c. (Pow 700. 1. 3 P. W. 290.

Title by

Of giving a Devise in Evc at Law.

The best proof of a Devc, is ~~[illegible]~~ the orig. Instrument itself, and regularly the best Evc is required in all cases. (Pow 708.) (Ergo where one, claiming an Estate relied upon a bill in Chy, exhibited by the heir (Pl. Deft.) denying the Devise, it was holden to be no Evc.) (Pow 702. 2 Rep. 35. 71. Pl. 117. Cro. E. 395.) - Ex. in ejectmt by devee

So, an exemplificn of a Devc ~~exemplified~~ under the great Seal, is no Evc to a jury in Ejectment. - (Pow 702. Cro. E. 45.) - It being only a Copy.

Devise.

Ld. w.c. given in evidence.

So, the prob.c of a will, in the Spiritual Ct., is no Ev.c of title to Land† (Poa 703 Comb. 248. ~~ff~~). As to Land, y.e proceedings are coram non judice. — (Ld. 182-3.

† devised by y.e same will.

Hence the prob.c of a will of Land, in that Ct, is not Ev.c even if the will is lost.t — For such prob.c is a nullity (Poa 703. 2 Ld. R. 732. 744. — infra ≠

But if neither of the parties to y.e suit has a right to the prob.c of the dev.c; a copy is admissible. (Poa 705. 6. 2 Ld. R. 735. Mott. 298. 25.): The same rule, wh applies to other private instrum.ts

≠ Supra.

(But yet, it is said, that the prob.c of a dev.c (at supr.), accompanied with other circumstantial ev.c is admissible, if the dev.c is proved to be lost. (Poa 706-7.) i.e. suppt. admissible, as is any private copy of any lost writing.

Dev.e given in ev.e

Title by

And it seems, that if a dev.e remains in Reg.y, by order of the Ct., a copy of it is admissible; for it is a roll of the Ct. and whose the Ct., in which it is lodged, has jurisd.n over the subject matter, a copy ~~is admissible~~ may be read. Bn, 207. Mal. 117. Gilb. L.E., 74.

Is not this the constant practice in C. on appeals from probate? - ~~But~~ ~~admissible, if the ex.r is contested~~? - unless the ex.r is denied?

But if proof of the attest.n is required, that must be proved by a subscribing witness, if either of them is living. (Bn, 708.). - This is a fact, not provable, in its own nature, by copy. - Hence no record of the contents.

* Note. Contra a probate in Reg.y see post, 134

If there has been a prob.e of the will in Reg.y, that conclusive ev.ce as to the fact. Cope — (Post, 134

Devising Power in Law.

Devise.

At Law, however, one of ye witnesses is suffict to prove what all have attested; provided he is able to testify not only that testa^r executed, & that he subscribed in testa's presence; but also, that the others did the same. Seems, he does not fully prove ye Exn^t. On his thus testifying the dev^e may be read^t. (Pow 708 (70.718) 1 P. W.) 41. 2 Show. 1254. (Page (limit. 28)

(without, however, the aid of) to the jury.

And tho' the subscribing witnesses are all present, it is not requisite that they all testify to the fact of testa's executing & publishing. If it were, an obstinate witness might defeat the devise. Pow 709 Skinn. 413. Holt. 742.

But if one of the witnesses refuses to swear, it is still necessary to prove ye fact of his attest^n. (Pow 709. Skinn. 413

giving dec.s in ev.ce

Title by

And the subscribing witnesses are allowed to deny the facts, which from the face of the instrument, they appear to have attested. (Pow.709.n. Skinn.79. 1 Atk. R. 385. 4 Bur. 2224. - Ex. their own attest.a - as to a's sanity or his signing - Yates J. one will contra.

Note 20. But the testimony of the subscribing witnesses is not conclusive, if they or dec.s If they shd. deny even their own subscription, the dec.s might contradict it by other witnesses. - Same rule as to test.a's sanity &c. (Pow.711. Sha. 1096. 1 Atk. R. 385. Bull 264.

(+ Ca of Mr Whitfield will).

Ev. v.s that testator was of unsound mind, merely as a testimony, not must attend the ex.n & credit of v.s in chief: & does not mean that they are to be cr.d, or their testimony to exclude all other ev.ce

On the other hand, their ev.ce in favor of the dec.s is not conclusive upon the heir - He may contradict them. (Pow.712, 710. Skinn.79. Gilb. Ev. 264. - Ante 20

Devising Real in Trust

But a Ct. of Chy will not direct an issue, to try the sanity of testa? where the subscribing witnesses swear that he was sane, unless the suggestion to the contrary, is supported by some direct Evd. (Pow 712. 3 Atk 354.

Title by

Proving a Devise in Chancery.

It is usual, in Eng., when a title to real Estate depends upon a will, formally to prove it in Chy. † especially if the will is of modern date. (2 Vern 714.

† i.e. to obtain a probate of it, in the Ct. as wills of personalty proved in ecclesiastical Ct.

The Probate of a Devise in Chy is, in effect, conclusive upon all persons, & prevents its being disputed afterwards, even in a Ct. of Law. For if the heir, or anyother, after the decree, attempt to controvert it; Chy. will issue an injunction ag.t him, (2 Vern 718. 1 Wils 216 (Rep ~~temp Talb~~) - forbidding him to contest it.

In C. Chy has no concern with the probate of devises, as wills. (Rep Pr. Ch. 163. The jurisdiction is vested, by statute, in the Ct. of Probate.

But Chy. will not decree a devise proved, unless the heir is "forth-coming" i.e. to be found. (2 Vern 714. 2 Atk 125) for his title may be burnt, & the proof destroyed, by it.

Devise.

~~It has now been held, that~~ Such a probe of a devse is not necessy. However, in order to establish a particular claim under it, even in Eqy. (Pow. 718. 3 P. W. 194. - ~~2 Ves.~~ See Evidence, 84.

And tho' the heir voluntarily makes default, yet ye devse will not be declared to be ~~well~~ proved, of course. Proof must still be made, as if it were contested. (Pow. 718. 3 Atk. 27.) (In 1 Eq.y, a default does not confess ye truth of a bill, except when a disclosure by ye dft is prayed).

The probe of a devse in Eqy, being thus conclusive, it is an established, invariable practice, in that Court, never to decree a devse proved, unless all ye subscribing witnesses are examined.* - For ye heir, + has a right to insist, that all them testify, before he is disinherited. (Pow. 718. 8 Ves. 216. 12 Ves. 177. 1 Cumb. 16. 28. - See Evidence, 84.

* Secus if one is dead, Concludo. (Pow. 720.

+ being Concluded by such a decree,

125.
Drawing wills
in Eq.

Title by

The practice of our Cts. of Probate is to declare a Will proved, on the oath of one of the witnesses. (R. L. 318.) ~~But the probate does not give any title.~~ (Page, Note, 28.

And the rule is the same in Eq. tho' one of the witnesses is beyond sea; Nor is his hand writing (unless in your Case) to be proved. For it is not presumed to be out of the power of the party claiming, to obtain his evidence. (Powell on Devises 459. 11th ed. 7. Skinn. 74. Page — Note 28.

The same rule (in this State), as to the proof of a Deed is to declare when it is proved, on your oath of some one of the subscribing witnesses. (Note 28. (See Evidence, 64): An appeal being allowed, in all cases by the unsuccessful party.

Devise.

When a commission issues from Chr to take Depns to prove a devr the devr itself is sometimes delivd out of the prerogative office on security given: but in some instances they have refused the prerogative Ct. to deliver it out, on security - (Bro. P.C. 3. Show 961. 1 Ath 627, 2 Ath 627. - vid 2 Vern 610.

A Bill to perpetuate the testimony of witnesses to the devr of a lunatic will not lie in his life time. The lunatic may recover, & revoke. (Bro. P.C. 3. 4. Vern 195. 1 Eq. C. abr. 234. 3. (Cary Rep 195.